National Guard Bureau

Office of Technician Personnel

LABOR RELATIONS PRACTITIONER'S GUIDE

For National Guard Labor Relations Professionals

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FOREWORD…

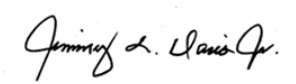
This Labor Relations Practitioners Guide is published by the National Guard Bureau Office of Technician Personnel to assist those human resource professionals who deal with the exciting field of Labor Relations. We felt a compilation of information from our own experiences, as well as a wide variety of sources, would be very appropriate for both new and experienced Labor Relations Specialists and supervisors working with National Guard Labor Relations issues.

This publication is part of the future directions of the National Guard Bureau Office of Technician Personnel to provide consummate customer service to the 54 States and Territories and the District of Columbia that are part of the National Guard family.

As this guide is being published, the Department of Defense (DOD) is outlining its proposals for a new labor relations system based on the enabling legislation passed by Congress for the National Security Personnel System (NSPS). There are many unique proposals for this system that do not resemble the current labor relations system referenced in this guide. The National Guard will not be impacted by some features of the NSPS, for example, national level bargaining, however, other features of the NSPS will likely impact the National Guard. You should consult NGB, DOD, OPM and State resources to keep abreast of these changes.

Special thanks are extended to the members of the Labor Relations Advisory Committee (LRAC) for this first edition of the Labor Relations Practitioner's Guide. I especially thank Major Jay Peno, Chairman of the Labor Relations Advisory Committee and a member of the Georgia National Guard HRO, for his leadership with the LRAC in designing, developing, compiling and writing this Guide.

We hope you find this handbook beneficial as an introduction and quick reference as well as a source of in-depth labor relations knowledge. Contract negotiations, one of the toughest tasks a new labor specialist will face, are covered extensively to give you life-long tools for your personal style and negotiation success. We welcome any comments or suggestions for additional topics or improvements you would like to share.



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And to all those I serve and partner with in this capacity;

Thank You!

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The first ten sections or approximately 50 pages serve as a quick reference –please continue for more in-depth training in National Guard Labor Relations.

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LABOR RELATIONS QUICK REFERENCE TO "THE CODE"

FEDERAL LABOR / MANAGEMENT RELATIONS – 5 U.S.C., Ch. 71

PRACTITIONER'S QUICK REFERENCE GUIDE (excerpts from Federal Labor Law)

BASIC EMPLOYEE RIGHTS UNDER 5 USC CHAPTER 71:

An employee has the right to:

- FORM, JOIN, or ASSIST a labor organization;
- ACT AS A REPRESENTATIVE of a labor organization;
- BARGAIN COLLECTIVELY through a labor organization.

THE BARGAINING UNIT:

Certain employees are excluded from bargaining units by 5 USC 7112.
These are the exclusions:

- Supervisors/Management officials;
- Employees engaged in personnel work (other than clerical);
- Employees working in a confidential capacity for officials who formulate general labor relations policy;
- Employees engaged in intelligence, or security work affecting national security;
- Employees investigating or auditing work or conduct of other agency employees;
- Professional employees unless a majority of the professionals vote for inclusion.

DEFINITION OF A SUPERVIS0R:

(Defined for labor as opposed to classification)

A supervisor, under 5 USC 7103, is a person authorized, with respect to employees, to do at least one of the following:

✓ hire	✓ promote	✓ transfer
✓ assign	✓ direct employees	✓ furlough
✓ recall	✓ discipline	✓ suspend
✓ lay off	✓ reward	✓ remove
	✓ adjust grievances	

or effectively recommend any such actions, if the exercise of such authority requires independent judgment. The number of employees supervised is not a relevant factor in this context.

UNION RIGHTS I/A/W EXCLUSIVE RECOGNITION:

5 USC 71114 states that a labor organization which has been accorded exclusive recognition:

- may negotiate agreements for all employees in the collective bargaining unit;
- is responsible for representing the interests of all bargaining unit employees whether they are union members or not;
- must be given the opportunity to be represented at all formal discussions between management and employees concerning grievances, personnel policies and practices, or other general conditions of employment;
- must be given the opportunity to be present at any investigative examination of a unit employee, if:
  (WEINGARTEN RIGHTS)
  - ➔ the employee reasonably believes the examination may result in disciplinary action; and
  - ➔ the employee requests representation.

Don't Forget the Annual Posting Requirement for Weingarten Rights!

FORMAL DISCUSSIONS UNDER 5 USC CHAPTER 71:

Generally, a meeting between management and an employee would be classified as formal when:

- more than one employee is impacted by the decisions reached or more than one management official is present at the meeting; or
- the meeting may result in a decision on an employees grievance.
- A meeting would usually not be classified as a formal discussion when:

the meeting is for a "personal counseling" session and does not involve matters affecting general working conditions; or

- ➔ the discussion is not at a level which could result in settlement of a grievance and there is no potential impact on other bargaining unit employees.
- when a meeting is a formal discussion, the union must be afforded an opportunity to be represented.

MANAGEMENT RIGHTS:

Under the law, certain "management rights" exist, which may not be abridged, regardless of the contract. 5 USC 7106 reserves the right to:

- determine the mission, budget, organization, number of employees, and internal security practices of the agency;
- hire, direct, layoff, and retain employees;
- suspend, remove, reduce in grade or pay, or discipline employees;
- assign work, determine need to contract out, and determine the personnel by which operations will be conducted;
- select and appoint employees from appropriate sources; and
- take necessary emergency action.

Any decision to act in these areas is a sole prerogative of management.
However, both procedures for exercising that authority and arrangements regarding affected employees are subject to negotiations.

MANAGEMENT UNFAIR LABOR PRACTICES (ULPs):

5 USC 7116(a) states it is an unfair labor practice for management to:

- interfere with, restrain, or coerce an employee in the exercise of the rights assured by 5 USC Chapter 71;
- encourage or discourage membership in a labor organization by discrimination with respect to conditions of employment;
- sponsor, control, or otherwise assist a labor organization;
- discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under 5 USC Ch. 71;
- fail to cooperate in impasse procedures;
- enforce rules or regulations in conflict with a prior collective bargaining agreement.

UNION UNFAIR LABOR PRACTICES:

Under 5 USC 7116(b) it is an unfair labor practice for a union to:

- interfere with, restrain or coerce an employee in the exercise of his rights assured by 5 USC Chapter 71;
- attempt to induce management to discriminate against an employee in the exercise of his or her rights under 5 USC Ch. 71;
- coerce or take an economic sanction against a union member as punishment or for the purpose of hindering work performance or productivity of a Federal employee.;
- discriminate against an employee with regard to the terms or
- conditions of membership because of race, color, creed, sex, age, national origin. civil service status, political affiliation, marital status, or handicapping condition;
- refuse to consult, or negotiate with an agency as required by the 5 USC Chapter 71;
- fail to cooperate in impasse procedures;
- call or engage in a strike, work stoppage, or slowdown, or picketing which interferes with an agency's operations.

USE OF OFFICIAL TIME:

Generally, employees representing the bargaining unit are authorized official time to negotiate contracts/MOU's, etc; discuss grievances; training; participate in discussions with management, etc. However, 5 USC 7131 provides that the INTERNAL business of a labor organization shall be conducted during the non-duty hours of the employees concerned (i.e.: solicitation of membership. collection of dues, elections, newsletter production. etc.).

Test answers for situational exercises at end of guide:
1-D, 2-A, 3-B, 4-A, 5-B, 6-B, 7-A, 8-C, 9-C, and 10-B

BARGAINING TECHNIQUES – POSITIONAL VS. PRINCIPLED – AN OVERVIEW:

This section contains a quick review and contrast of the two most common bargaining or negotiating techniques: Positional or "Distributive" and Principled sometimes known as "mutual gains" or "Interest-Based."

Positional Bargaining?

This is the situation where each bargaining party takes a position, argues for it, and makes concessions to reach a compromise. A classic example is the haggling that takes place between you and a car salesman. The negotiations in such cases depend upon successively taking and then giving up a sequence of positions. Perhaps you will reach agreement, perhaps not.

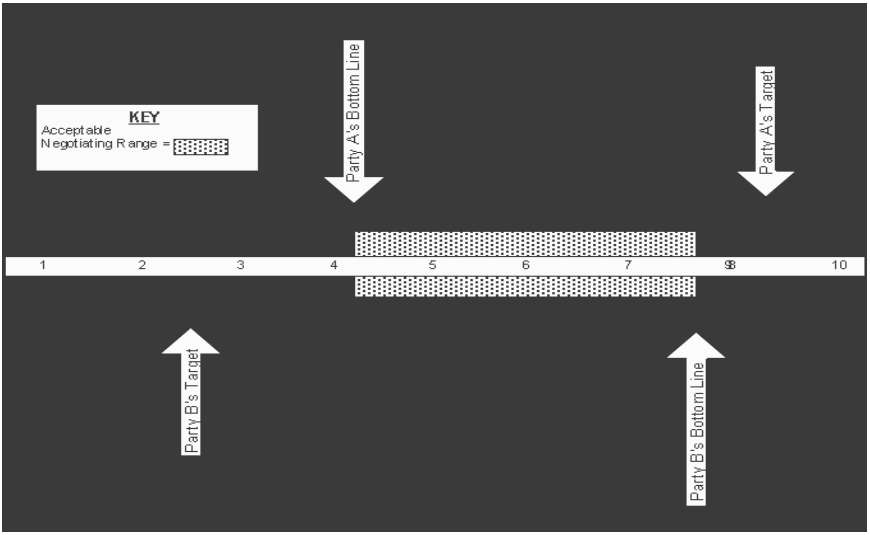
Though taking positions, as in the management/labor situation, serves some useful purposes in a negotiation; as it tells the other side what you want; it provides an anchor in an uncertain and pressured situation and it can eventually produce the terms of an acceptable (barely) agreement. However, positional bargaining fails to meet the basic criteria of producing a wise agreement, efficiently and amicably. When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack the more committed you become to it.

In fact, your ego becomes identified with your position – you now have a new interest in saving face. As more attention is paid to positions, less attention is devoted to meeting the underlying concerns and interest of the parties. Thus agreement becomes less likely as each negotiator asserts what he or she will do and won't do – the whole thing becomes a contest of will.

More seriously, pursuing a soft and friendly positional bargaining makes you vulnerable to someone who plays a hard game of positional bargain – because in positional bargaining, a hard game dominates a soft one. If the hard bargainer insists on concessions and makes threats while the soft bargainer yields in order to avoid confrontation and insists on agreement, the negotiating game is biased in favor of the hard player. This process will produce an agreement, although it may not be a wise, or desirable one for either side!

POSITIONAL BARGAINING QUICK DEFINITION

A negotiation process in which a series of positions are presented as the solution to the issue in question. Positions are generally presented sequentially so that the first position is a large demand and subsequent positions request less of an opponent.



POSITIONAL BARGAINING TECHNIQUES:

- Involves alternative solutions to an issue that meet the need of one party
- Negotiators present their initial solutions
- Series of incremental concessions
- Arrive at a compromise
- Assumes:
    - fixed sum resources-one more the other less
    - relationships not a high priority
- Disadvantages:
    - shortchanges exploration of alternatives
    - leads to adversarial relationships
- Advantages:
    - does not require trust
    - useful in division of fixed sum resources

A wise agreement can be defined as one which meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly and is durable, and takes community interests into account.

How then do you approach a Negotiation to get the best results? An alternative to positional bargaining, whether soft or hard is to adopt a method of negotiation designed to produce a wise outcomes efficiently and amicably to the satisfaction of both parties.

This method is called "Principled Negotiation" or negotiation on the merits best illustrated with a technique known as Interest-Based Bargaining.

Interest Based Bargaining:

Interest-Based Bargaining (IBB) (also sometimes called "mutual gains" bargaining or "win-win" bargaining) is a term that refers to a form of negotiating where the parties look for common ground and attempt to satisfy mutual interests through the bargaining process. Whereas traditional bargaining focuses on taking and defending positions, in IBB the emphasis is on exploring the interests of the parties and how can they be reconciled. IBB is an effort to look behind positions to determine the needs of the parties and whether there are mutually acceptable ways that labor and management can satisfy those needs.

IBB differs substantially from traditional negotiating techniques in its reliance upon a variety of techniques to promote open communication, such as brainstorming, facilitation, and information sharing. The purpose of exchanging ideas and information is to develop options. Those options are then evaluated both in terms of their effectiveness in resolving the problem and their acceptability to the parties. The objective of the entire process is to reach agreement by consensus. In consensus decision making, the intent is to achieve a resolution that everyone can accept and support even though that course of action might not be their first choice.

REF: Title 5 USC Ch 71; 5 CFR Chapter XIV

KEYS TO IBB SUCCESS:

There are a number of factors key to making win-win negotiations and labor- management cooperation successful, including;

Commitment to the Process. Both parties must be committed to bringing about a cultural change whereby they listen to each other, understand each other's needs and interests, and seek solutions designed to strengthen each party.

Information Sharing and Trust. Candor is essential to building trust. Neither party can be surprised by the other and privileged and private conversations stay that way.

Model Behavior. At all stages of negotiation and during day-to-day contract administration, union leaders and managers need to model cooperative behavior. They must set the example for all to follow.

Time to Prepare. Key leaders on each bargaining team need to have a sense of trust and commitment to the effort so they are willing to take risks, be candid, share information, and model cooperative behavior. It takes time to build this trust and rapport and between key players it must be done prior to sitting down at the bargaining table.

Isolate the Problem. The parties need to accept that some people will not adopt this new approach and can be disruptive to their mutual interests. The parties need to isolate these individuals, if at all possible, and concentrate on the vast majority of managers and employees who prefer the cooperative model.

Contract Is Only Paper. The key to success is understanding that the conclusion of negotiations is only the beginning of a long term partnership between union and management to implement the contract and market this new cooperative approach. Organizational culture cannot be changed just by issuing a new contract to everyone. The parties must develop a strategy for change over the life of the contract and beyond.

REF: Executive Order 12871; Executive Order 13203

IBB – PREPARING TO BARGAIN:

1. Select Team Members
2. Select Facilitator(s)
3. Jointly Train
4. Identify Issues
5. Analyze Problems and Opportunities
6. Develop Ground Rules

IBB – Suggested Ground Rules:

1. Start promptly; be punctual
2. Respect other's opinions
3. Full sharing of information; openness
4. Facilitation of discussion; allow people to finish thoughts
5. Allow everyone to contribute/speak
6. One speaker at a time; do not interrupt

7. Allow clarification
8. Attack the issue, not the person
9. Ask for clarification; no such thing as a stupid question
10. OK to revisit issues
11. OK to table issues with minimal discussion for later revisit
12. Commitment on a final document
13. Decision by consensus without feeling any important idea has been compromised
14. Offer option if consensus cannot be reached
15. Check for closure
16. Honesty should be part of the meeting
17. Pay attention (active listening)
18. Adequate breaks should be taken
19. No cheap shots
20. No name calling

KEY ROLES IN IBB:

Facilitator

- Keep the group on task
- Assure balanced participation
- Help parties to adhere to established rules
- Remain neutral

Recorder

- Capture basic ideas and key words
- Write rapidly,but legibly
- Number, date, and maintain documents

Participants

- Prepare thoroughly
- Comply with conduct and procedure rules
- Contribute ideas and concerns

INTEREST BASED BARGAINING – CONTINUED!

- Focuses on satisfying as many needs as possible
- Explores disputants interests underlying positions
- Resources not regarded fixed (when possible)
- Cooperative problem-solving approach
- May uncover divergent values-may take time
- May produce outcomes with unexpected benefits
- Strengthens relationships

Triangle of Satisfaction

Areas to consider for successful negotiations…

- Substantive
- Procedural
- Psychological

Triangle of Satisfaction

- Substantive
  - access to areas of concern
  - rules, regulatory roadblocks
  - working conditions
- Procedural: mechanics of dispute resolution
  - appropriate structure, agreement on the process?
  - settlement congruent with existing obligations?
- Psychological
  - disputants included; fair process
  - address issues of stereotype and bias

Dispute Avoidance

- Needs to happen:
  - Correct identification of interests
- Actually occurring:
  - Regulatory harmonization

Identification of Interests

- Competitive interests
  - "one party swims, the other sinks"
- Cooperative interests: linked goals, interdependence
  - "everyone sinks or swims together"
- Cooperative but separate

Still More Interest-Based Problem Solving!

BASICS OF INTEREST-BASED PROBLEM-SOLVING

- **ISSUE** - a subject of discussion or negotiation; the *wha*t; the problem to be solved
- **INTEREST** - one party's concern, need, or desire behind an issue; *why* the issue is being raised (mutual or separate)
- **POSITION** - one party's proposed solution to an issue; the *how*

DEFINE ISSUE CLEARLY

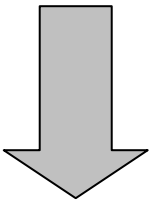
An issue is a subject under discussion or negotiation. The first step in interest-based problem solving is to understand clearly what the issue or problem really is.

INTERESTS REVEAL THE FULL DIMENSIONS OF THE ISSUE

- An interest is a party's concern or need behind the issue. It expresses why constituents care, the reason for raising the issue for discussion or negotiation. When all of the interests of both parties are brought together, they provide the full scope and dimension of the issue to be resolved.
- When union and management interests are placed side by side, the team frequently discovers that several interests are held in common. These are mutual interests.
- Many interests are held by one party only. These separate interests can often be met without interfering with the other party's interests. Separate interests are not always opposing interests.

REMEMBER – A POSITION REFLECTS ONE PARTY'S DEMAND!

A position is one party's proposed solution to an issue. Stated up front, it expresses what one party wishes.



Interest Based Problem Solving – *cont'd*

Labor-Management Cooperation **– Don't Bargain Over Positions!!!**		
Problem		**Solution**
Positional Bargaining: Which game should you play?		Change the Game – Negotiate on the merits
Soft	**Hard**	**Principled**
Participants are friends.	Participants are adversaries.	Participants are problem solvers.
The goal is agreement.	The goal is victory.	The goal is wise outcome reached efficiently and amicably.
Make concessions to cultivate the relationship.	Demand concessions as a condition of the relationship.	Separate the people from the problem.
Be soft on the people and the problem.	Be hard on the problem and the people.	Be soft on the people, hard on the problem.
Trust others.	Distrust others.	Proceed independent of trust.
Change your position easily.	Dig in on your position	Focus on interests, not positions.
Make offers.	Make threats.	Explore interests.
Disclose your bottom line.	Mislead as to your bottom line.	Avoid having a bottom line.
Accept one-sided losses to reach agreement.	Demand one-sided gains as the price of agreement.	Invent options for mutual gain.
Search for the single answer; the one *they* will accept.	Search for the single answer; the one *you* will accept.	Develop multiple options to choose from; decide later.
Insist on agreement.	Insist on your position.	Insist on using objective criteria.
Try to avoid a contest of will.	Try to win a contest of will.	Try to reach a result based on standards independent of will.
Yield to pressure.	Apply pressure.	Reason and be open to reasons; yield to principle, not pressure.

GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN

Roger Fisher and William Ury

A Quick Summary…*Please Read the Chapters on Negotiating from a Collegiate and Real World Perspective for In-Depth Knowledge that Will Help You Develop Your Own Expert Negotiating Style!*

Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In, (New York: Penguin Books, 1983).

In this classic text, Fisher and Ury describe their four principles for effective negotiation. They also describe three common obstacles to negotiation and discuss ways to overcome those obstacles.

Fisher and Ury explain that a good agreement is one which is wise and efficient, and which improves the parties' relationship. Wise agreements satisfy the parties' interests and are fair and lasting. The authors' goal is to develop a method for reaching good agreements. Negotiations often take the form of positional bargaining. In positional bargaining each part opens with their position on an issue. The parties then bargain from their separate opening positions to agree on one position. Haggling over a price is a typical example of positional bargaining. Fisher and Ury argue that positional bargaining does not tend to produce good agreements. It is an inefficient means of reaching agreements, and the agreements tend to neglect the parties' interests. It encourages stubbornness and so tends to harm the parties' relationship. Principled negotiation provides a better way of reaching good agreements. Fisher and Ury develop four principles of negotiation. Their process of principled negotiation can be used effectively on almost any type of dispute. Their four principles are 1) separate the people from the problem; 2) focus on interests rather than positions; 3) generate a variety of options before settling on an agreement; and 4) insist that the agreement be based on objective criteria. [p. 11]

These principles should be observed at each stage of the negotiation process. The process begins with the analysis of the situation or problem, of the other parties' interests and perceptions, and of the existing options. The next stage is to plan ways of responding to the situation and the other parties. Finally, the parties discuss the problem trying to find a solution on which they can agree.

Separating People and Issues

Fisher and Ury's first principle is to separate the people from the issues. People tend to become personally involved with the issues and with their side's positions. And so they will tend to take responses to those issues and positions as personal attacks. Separating the people from the issues allows the parties to address the issues without damaging their relationship. It also helps them to get a clearer view of the substantive problem.

The authors identify three basic sorts of people problems. First are differences on perception among the parties. Since most conflicts are based in differing interpretations of the facts, it is crucial for both sides to understand the other's viewpoint. The parties should try to put themselves in the other's place. The parties should not simply assume that their worst fears will become the actions of the other party. Nor should one side blame the other for the problem. Each side should try to make proposals which would be appealing to the other side. The more that the parties are involved in the process, the more likely they are to be involved in and to support the outcome.

Emotions are a second source of people problems. Negotiation can be a frustrating process. People often react with fear or anger when they feel that their interests are threatened. The first step in dealing with emotions is to acknowledge them, and to try to understand their source. The parties must acknowledge the fact that certain emotions are present, even when they don't see those feelings as reasonable. Dismissing another's feelings as unreasonable is likely to provoke an even more intense emotional response. The parties must allow the other side to express their emotions. They must not react emotionally to emotional outbursts. Symbolic gestures such as apologies or an expression of sympathy can help to defuse strong emotions.

Communication is the third main source of people problems. Negotiators may not be speaking to each other, but may simply be grandstanding for their respective constituencies. The parties may not be listening to each other, but may instead be planning their own responses. Even when the parties are speaking to each other and are listening, misunderstandings may occur. To combat these problems, the parties should employ active listening. The listeners should give the speaker their full attention, occasionally summarizing the speaker's points to confirm their understanding. It is important to remember that understanding the other's case does not mean agreeing with it. Speakers should direct their speech toward the other parties and keep focused on what they are trying to communicate. Each side should avoid blaming or attacking the other, and should speak about themselves.

Generally the best way to deal with people problems is to prevent them from arising. People problems are less likely to come up if the parties have a good relationship, and think of each other as partners in negotiation rather than as adversaries.

Focus on Interests

Good agreements focus on the parties' interests, rather than their positions. As Fisher and Ury explain, "Your position is something you have decided upon. Your interests are what caused you to so decide."[p. 42] Defining a problem in terms of positions means that at least one party will "lose" the dispute. When a problem is defined in terms of the parties' underlying interests it is often possible to find a solution which satisfies both parties' interests.

The first step is to identify the parties' interests regarding the issue at hand. This can be done by asking why they hold the positions they do, and by considering why they don't hold some other possible position. Each party usually has a number of different interests underlying their positions. And interests may differ somewhat among the individual members of each side. However, all people will share certain basic interests or needs, such as the need for security and economic well-being.

Once the parties have identified their interests, they must discuss them together. If a party wants the other side to take their interests into account, that party must explain their interests clearly. The other side will be more motivated to take those interests into account if the first party shows that they are paying attention to the other side's interests. Discussions should look forward to the desired solution, rather than focusing on past events. Parties should keep a clear focus on their interests, but remain open to different proposals and positions.

Generate Options

Fisher and Ury identify four obstacles to generating creative options for solving a problem. Parties may decide prematurely on an option and so fail to consider alternatives. The parties may be intent on narrowing their options to find the single answer. The parties may define the problem in win-lose terms, assuming that the only options are for one side to win and the other to lose. Or a party may decide that it is up to the other side to come up with a solution to the problem.

The authors also suggest four techniques for overcoming these obstacles and generating creative options. First it is important to separate the invention process from the evaluation stage. The parties should come together in an informal atmosphere and brainstorm for all possible solutions to the problem. Wild and creative proposals are encouraged. Brainstorming sessions can be made more creative and productive by encouraging the parties to shift between four types of thinking: stating the problem, analyzing the problem, considering general approaches, and considering specific actions. Parties may suggest partial solutions to the problem. Only after a variety of proposals have been made should the group turn to evaluating the ideas. Evaluation should start with the most promising proposals. The parties may also refine and improve proposals at this point.

Participants can avoid falling into a win-lose mentality by focusing on shared interests. When the parties' interests differ, they should seek options in which those differences can be made compatible or even complementary. The key to reconciling different interests is to "look for items that are of low cost to you and high benefit to them, and vice versa."[p. 79] Each side should try to make proposals that are appealing to the other side, and that the other side would find easy to agree to. To do this it is important to identify the decision makers and target proposals directly toward them. Proposals are easier to agree to when they seem legitimate, or when they are supported by precedent. Threats are usually less effective at motivating agreement than are beneficial offers.

Use Objective Criteria

When interests are directly opposed, the parties should use objective criteria to resolve their differences. Allowing such differences to spark a battle of wills will destroy relationships, is inefficient, and is not likely to produce wise agreements. Decisions based on reasonable standards makes it easier for the parties to agree and preserve their good relationship.

The first step is to develop objective criteria. Usually there are a number of different criteria which could be used. The parties must agree which criteria is best for their situation. Criteria should be both legitimate and practical. Scientific findings, professional standards, or legal precedent are possible sources of objective criteria. One way to test for objectivity is to ask if both sides would agree to be bound by those standards. Rather than agreeing in substantive criteria, the parties may create a fair procedure for resolving their dispute. For example, children may fairly divide a piece of cake by having one child cut it, and the other choose their piece.

There are three points to keep in mind when using objective criteria. First each issue should be approached as a shared search for objective criteria. Ask for the reasoning behind the other party's suggestions. Using the other parties' reasoning to support your own position can be a powerful way to negotiate. Second, each party must keep an open mind. They must be reasonable, and be willing to reconsider their positions when there is reason to. Third, while they should be reasonable, negotiators must never give in to pressure, threats, or bribes. When the other party stubbornly refuses to be reasonable, the first party may shift the discussion from a search for substantive criteria to a search for procedural criteria.

When the Other Party Is More Powerful

No negotiation method can completely overcome differences in power. However, Fisher and Ury suggest ways to protect the weaker party against a poor agreement, and to help the weaker party make the most of their assets.

Often negotiators will establish a "bottom line" in an attempt to protect themselves against a poor agreement. The bottom line is what the party anticipates as the worst acceptable outcome. Negotiators decide in advance of actual negotiations to reject any proposal below that line. Fisher and Ury argue against using bottom lines. Because the bottom line figure is decided upon in advance of discussions, the figure may be arbitrary or unrealistic. Having already committed oneself to a rigid bottom line also inhibits inventiveness in generating options.

Instead the weaker party should concentrate on assessing their best alternative to a negotiated agreement (BATNA). The authors note that "the reason you negotiate is to produce something better than the results you can obtain without negotiating."[p. 104] The weaker party should reject agreements that would leave them worse off than their BATNA. Without a clear idea of their BATNA a party is simply negotiating blindly. The BATNA is also key to making the most of existing assets. Power in a negotiation comes from the ability to walk away from negotiations. Thus the party with the best BATNA is the more powerful party in the negotiation. Generally, the weaker party can take unilateral steps to improve their alternatives to negotiation. They must identify potential opportunities and take steps to further develop those opportunities. The weaker party will have a better understanding of the negotiation context if they also try to estimate the other side's BATNA. Fisher and Ury conclude that "developing your BATNA thus not only enables you to determine what is a minimally acceptable agreement, it will probably raise that minimum."[p. 111]

When the Other Party Won't Use Principled Negotiation

Sometimes the other side refuses to budge from their positions, makes personal attacks, seeks only to maximize their own gains, and generally refuses to partake in principled negotiations. Fisher and Ury describe three approaches for dealing with opponents who are stuck in positional bargaining. First, one side may simply continue to use the principled approach. The authors point out that this approach is often contagious.

Second, the principled party may use "negotiation jujitsu" to bring the other party in line. The key is to refuse to respond in kind to their positional bargaining. When the other side attacks, the principles party should not counter attack, but should deflect the attack back onto the problem. Positional bargainers usually attack either by asserting their position, or by attacking the other side's ideas or people. When they assert their position, respond by asking for the reasons behind that position. When they attack the other side's ideas, the principle party should take it as constructive criticism and invite further feedback and advice. Personal attacks should be recast as attacks on the problem. Generally the principled party should use questions and strategic silences to draw the other party out.

When the other party remains stuck in positional bargaining, the one-text approach may be used. In this approach a third party is brought in. The third party should interview each side separately to determine what their underlying interests are. The third party then assembles a list of their interests and asks each side for their comments and criticisms of the list. She then takes those comments and draws up a proposal. The proposal is given to the parties for comments, redrafted, and returned again for more comments. This process continues until the third party feels that no further improvements can be made. At that point, the parties must decide whether to accept the refined proposal or to abandon negotiations.

When the Other Party Uses Dirty Tricks

Sometimes parties will use unethical or unpleasant tricks in an attempt to gain an advantage in negotiations such as good guy/bad guy routines, uncomfortable seating, and leaks to the media. The best way to respond to such tricky tactics is to explicitly raise the issue in negotiations, and to engage in principled negotiation to establish procedural ground rules for the negotiation.

Fisher and Ury identify the general types of tricky tactics. Parties may engage in deliberate deception about the facts, their authority, or their intentions. The best way to protect against being deceived is to seek verification the other side's claims. It may help to ask them for further clarification of a claim, or to put the claim in writing. However, in doing this it is very important not to bee seen as calling the other party a liar; that is, as making a personal attack. Another common type of tactic is psychological warfare.

When the tricky party uses a stressful environment, the principled party should identify the problematic element and suggest a more comfortable or fair change. Subtle personal attacks can be made less effective simply be recognizing them for what they are. Explicitly identifying them to the offending party will often put an end to suck attacks. Threats are a way to apply psychological pressure. The principled negotiator should ignore them where possible, or undertake principled negotiations on the use of threats in the proceedings.

The last class of trick tactics are positional pressure tactics which attempt to structure negotiations so that only one side can make concessions. The tricky side may refuse to negotiate, hoping to use their entry into negotiations as a bargaining chip, or they may open with extreme demands. The principled negotiator should recognize this as a bargaining tactic, and look into their interests in refusing to negotiate. They may escalate their demands for every concession they make.

The principled negotiator should explicitly identify this tactic to the participants, and give the parties a chance to consider whether they want to continue negotiations under such conditions. Parties may try to make irrevocable commitments to certain positions, or to make-take-it-or-leave-it offers. The principled party may decline to recognize the commitment or the finality of the offer, instead treating them as proposals or expressed interests. Insist that any proposals be evaluated on their merits, and don't hesitate to point out dirty tricks.

Do not loose sight of the fact that Getting to Yes may not be perfect…

Weaknesses of Getting to Yes…

Perhaps the greatest drawback is the risk of giving on principle for the sake of closure. It is possible to be such a good, brilliant negotiator, that you could get in trouble for making a deal seem more important than principle. You could give away too much in the interests of closure.

Perhaps the authors main fallacy is that they believe that shared interests lie latent in every negotiation. Under this delusion, the authors tend to paint a rosy picture of negotiation that is not always the case.

This book may do the readers a grave disservice by making them think that 1) things will always work out if they use this method, 2) that people will reveal their interests honestly and 3) people won't take advantage of your openness.

THINGS WON'T ALWAYS WORK OUT:

Getting to Yes does not alert the reader or give us help identifying when the negotiation is strictly distributive. Fisher and Ury cannot honestly believe that there are always latent interests to be satisfied in a used car sale, a salary raise, or war for that matter. I may ask $5000 for my used car. The first person to give me $5000 will get my car. There is no latent interest that I have that someone can satisfy without giving me $5000. The same may be the case in war. If a ruler wants ethnic cleansing, there may be nothing latent in this interest besides getting rid of people that are not of the same ethnicity. There may be no getting to yes when you sit down across the table from this ruler - you may need to play hard ball. In an absurd example, they have union negotiators agreeing that a softball team would make everyone happy. I believe this is truly unrealistic. Union negotiations can be nasty and extremely difficult. A softball game/team may be their only shared interest, but it does not alleviate the real problem.

HONESTY IS NOT ALWAYS RECIPROCAL:

The other side may not always honestly reveal their interests. They may know what your interest are going in and act they have an opposite interest that is strong. Then later, they can give concessions on this interest to get concessions on another interest in which you are both diametrically opposed

BE CAREFUL WHAT YOU REVEAL:

Fisher and Ury may not alert their readers to the possible dangers of generating possible solutions. If the person you are negotiating against/with is not schooled in the Fisher technique, they may become fixated on one of the options and feel is if they are doing you a favor if they move away from it.

IMPACT & IMPLEMENTATION (I&I) BARGAINING NOTES:

I & I BARGAINING
(Impact and Implementation Bargaining)

Even where the decision to change conditions of employment of unit employees is protected by management's rights, there is a duty to notify the union and, upon request, bargain on procedures that management will follow in implementing its protected decision as well as on appropriate arrangements for employees expected to be adversely affected by the decision. Such bargaining is commonly referred to as "impact and implementation," or "I&I" bargaining.

CONDITIONS OF EMPLOYMENT

Under title 5, United States Code, section 7103(a)(14), conditions of employment "means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise [e.g., by custom or practice], affecting working conditions, except that such term does not include policies, practices, and matters--(A) relating to prohibited political activities or classification to the extent such matters are *specifically provided for by Federal statute*.

PROCEDURES

Under title 5, United States Code, section 7106(b)(2), the procedures observed by management in exercising its reserved rights are negotiable. To qualify as a negotiable (b)(2) procedure, the proposed "procedure" must not require the use of standards that, by themselves, directly interfere with management's reserved rights or otherwise have the effect of limiting management's reserved discretion.

APPROPRIATE ARRANGEMENT

One of three exceptions to management's rights. Under title 5, United States Code, section 7106(b)(3), a proposal that interferes with management's rights can nonetheless be negotiable if the proposal constitutes an "arrangement" for employees adversely affected by the exercise of a management right and if the interference with the management right isn't "excessive" (as determined by an excessive interference balancing test).

THREE EXCEPTIONS

The three title 5, United States Code, section 7106(b) exceptions to the above involve (1) title 5, United States Code, section 7106(b)(1) **permissive subjects** of bargaining (e.g., staffing patterns, technology) on which, under the statute, agencies can elect to bargain, (2) **procedures** management will follow in exercising its reserved rights, and (C) **appropriate arrangements** for employees adversely affected by the exercise of management rights.

1. "PERMISSIVE" SUBJECTS EXCEPTION

This exception to management's rights deals with staffing patterns--i.e., with "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" and with "the technology, methods, and means of performing work." Under the statute such matters are, moreover, negotiable "at the election of the agency."

2. "PROCEDURAL" EXCEPTION

Title 5, United States Code, section 7106(b)(2), dealing with procedures, really isn't an exception to management's rights as the Authority has held that a proposed procedure that "directly interferes" with a management right is not a procedure within the meaning of title 5, United States Code, section 7106(b)(2).

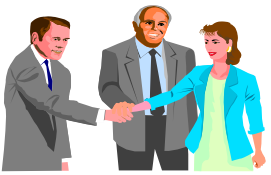
3. APPROPRIATE ARRANGEMENT EXCEPTION

Title 5, United States Code, section 7106(b)(3) applies only if the proposal is intended to ameliorate the adverse effects of the exercise of a management right. Where such is the intent of the proposal, the Authority applies a balancing test in which it weighs the extent to which the proposal ameliorates the expected adverse effects against the extent to which it interferes with he management right and determines whether or not the specific proposal "excessively" interferes with the management right. If the interference is "excessive," the proposal isn't an appropriate arrangement and therefore is nonnegotiable. If otherwise, the proposal is a negotiable appropriate arrangement, even though it interferes with management's rights.

To qualify as an "arrangement" to which it would be proper to apply the excessive interference balancing test, the proposal has to be "tailored" so that it applies only to those employees who would be adversely affected by the proposed management decision.

4. PAST PRACTICE DEFENSE HIGHLIGHTS

Past practice is the term used to describe a pattern of workplace behavior that is sufficiently clear, of long enough duration, and well enough known to both management and union officials to constitute an unwritten rule or policy. To qualify as a bona fide past practice, such a pattern of behavior must also involve a condition of employment of bargaining unit employees, and must not conflict with applicable laws or government-wide regulations. Once established, essentially by unwritten consensus or silent toleration, a past practice becomes just as enforceable as a formally negotiated workplace rule that is placed in writing by the parties. That is, it may be enforced through application of the ULP procedures of the statute and the negotiated grievance procedure of a labor agreement.



The bottom line…

Any time you are contemplating changing conditions of employment, offer the union an opportunity to discuss it … a short discussion now can save weeks of headaches later, and help build your relationship!

LABOR MANAGEMENT RELATIONS – WHAT CAUSES A GRIEVANCE?

General Causes

- Labor/Management Relations (reactions between diverse people
- Self Interest (how will this change affect me)
- Authority Complex (let authority go to the head or conversely reject all authority)
- Communication Barriers (written, spoken and body language)
- Self-Justification (resent having decisions questioned and do everything to justify)
- Gut Reactions (reactions without logic may not address built in biases)
- Union Attitudes (push agendas or have "get management" attitude)

Specific Causes

(Employee/Supervisor/Shop Steward)

EMPLOYEE:

- Qualifications do match the job
- Personal problems (refer to EAP)
- Unreliable/Antagonistic employees
- Linguistic/Racial/Cultural barriers
- Union Membership (I am immune to discipline)

SUPERVISOR:

- Wrong attitude toward the Union
- Weak supervisory skills
- Unjust discipline
- Favoritism and Inconsistency
- Promises made to employees
- Failure to eliminate sources of irritation
- Unclear orders/instructions
- Failure to keep workforce informed
- Failure to dispel rumors
- Failure to listen and consider employee's viewpoints
- Incomplete knowledge of the labor contract

SHOP STEWARD:

- Incomplete knowledge of the labor contract
- Making unwarranted promises
- Failure to act on complaints
- Showing favoritism
- Failure to set a good example
- Playing union politics (stir it up and solve it)
- Allowing rumors to circulate

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LABOR RELATIONS HOT ITEM – CONDUCT MANAGEMENT!

A Primer on Disciplinary and Adverse Actions

(Stay out of trouble – DON'T FORGET WEINGARTEN – Annual Posting Requirement!!! – See Definitions and In-Depth Knowledge)

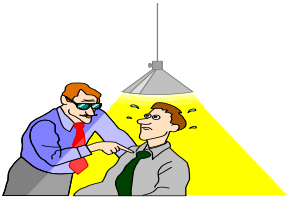
SUPERVISOR'S ROLE

- **Ensure workers know expected behavior**
- **Ensure they know consequences of unacceptable behavior**
- **Respond to ALL cases; bring to employee's attention immediately – apply consistent standards**
- **Offer help through the Employee Assistance Program**
- **Remove names/personalities to minimize bias; focus on problems - not the person**
- **Initiates all disciplinary and adverse actions**

SUPERVISORS MUST

- **ALWAYS contact the Human Resources Office prior to issuing proposed disciplinary or adverse actions**
- **Receive Human Resources Office approval prior to issuing original decisions on disciplinary or adverse actions**
- **Review proposed penalty with the deciding official**
- **Use the templates provided by Human Resources as guidelines for disciplinary or adverse actions**

Good Practice – Involve the union and offer representation whenever discipline is contemplated – If the employee declines union representation…GET IT IN WRITING!



The "Douglas Factors" – For Review Prior to Taking Discipline:

These factors will help you determine the "appropriateness" and consistency of a penalty and must be considered prior to taking a disciplinary action…

- ☑ **Consider the nature and seriousness of the offense, and its relation to the technician's duties, position, and responsibilities, including whether the offense was intentional or inadvertent, or was committed maliciously or for gain, or was frequently repeated.**
- ☑ **Consider the technician's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.**
- ☑ **Consider the technician's past disciplinary record.**
- ☑ **Consider the technician's past work record, including the length of service, performance on the job, ability to get along with fellow workers, and dependability.**
- ☑ **Consider the effect of the offense on the employee's ability to perform his/her job at a satisfactory level and its effect on supervisor's confidence in the technician's ability to perform assigned duties.**
- ☑ **Consider the consistency of the penalty with those imposed on other technicians for the same or similar offenses.**
- ☑ **Consider the consistency of the penalty with NGB guidance on disciplinary actions.**
- ☑ **Consider the notoriety of the offense and its impact on the reputation of the agency.**
- ☑ **Consider the clarity with which the employee was on notice of any rules violated in committing the offense, or any warning about the conduct in question.**
- ☑ **Consider the potential for the technician's rehabilitation.**
- ☑ **Consider mitigating circumstances surrounding the offense such as unusual job tensions, personal problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter.**
- ☑ **Consider the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.**

A person taking discipline should be able to answer or explain a consideration of all twelve of the "Douglas Factors" prior to making the final disciplinary decision.

Burden of Proof

In disciplining employees, management bears the responsibility of proving the appropriateness of its actions, if challenged. Significant disciplinary actions (e.g., suspensions of greater than 14 days, reductions in grade or pay, and removals) may be appealed to the Merit Systems Protection Board (MSPB). In an appeal to MSPB, management must be prepared to demonstrate by a preponderance of the evidence that the misconduct or other wrongdoing occurred, that there is a rational connection between the misconduct or other cause of action and the "efficiency of the service," and that the penalty selected did not clearly exceed the limits of reasonableness.

Penalty Selection and Governing Criteria

The determination of which penalty to impose in a particular situation requires the application of responsible judgment. Disciplinary action taken is based on the conclusion that there is sufficient evidence available to support the reason(s) for action and that the disciplinary action is warranted and reasonable in terms of the circumstances which prompted it. In determining the appropriate remedy, management must observe the principle of "like penalties for like offenses in like circumstances." This means that penalties will be applied as consistently as possible. Management must establish that the penalty selected does not clearly exceed the limits of reasonableness. A well known Merit Systems Protection Board (MSPB) case (Douglas v. Veterans Administration) addressed this issue in detail. A number of factors which management must weigh in deciding an appropriate course of action are discussed in this case. These factors are often referred to as the Douglas factors. Some factors may not be applicable to a given case; relevant factors must be considered. Bear in mind, however, that certain offenses (e. g., drug trafficking) warrant mandatory penalties. Any decision notice concerning an adverse action, which may be reviewed by the MSPB, should cite the fact that the relevant Douglas factors were weighed in reaching the decision.

Discipline and Adverse Actions – In Depth

You must ensure that the provisions of Technician Personnel Regulation (TPR) 752, your labor agreement, and state policies and procedure are followed when administering discipline and adverse actions. The following is a brief overview of items included in TPR 752. The TPR 752 should be further consulted for a more in depth explanation of discipline and adverse action.

Counseling and Warning are not disciplinary actions

Disciplinary Actions include:

- Oral Admonishment
- Letter of Reprimand

Adverse Actions include:

- Suspension
- Change to Lower Grade
- Removal

Them management of conduct in the workplace can only be achieved when supervisors ensure the following principles are followed in administering discipline:

- Timely
- Consistent
- Progressive Discipline*

*If conduct fails to improve, disciplinary action get tougher. Progressive discipline gives warning that the conduct will not be tolerated and what the outcome will be if it continues.

COUNSELING

- It is a friendly, business-like exchange of information guided by the supervisor.
- It is a private matter with specific the purpose of improving the technician's conduct and knowledge of a particular subject.
- It is not disciplinary action.
- It should be annotated in pencil (date and subject) on the NGB Form 904-1 or computer generated supervisor's brief.

WARNING

- This also is a private matter between the technician and supervisor.
- It has a more serious intent because along with the business-like exchange of information, a warning that disciplinary or adverse action may result if the problem is not corrected is given.
- It is not a disciplinary action.
- It should be annotated in pencil (date and subject) on the NGB Form 904-1 or computer generated supervisor's brief.

ORAL ADMONISHMENT

- Disciplinary action notifying a technician to desist from a certain course of action.
- It should take place in as private an environment as possible.
- It should be in the form of the most appropriate criticism necessary to correct the technician.
- Ensure that all relevant facts have been raised.
- Discuss the facts and give the technician an opportunity to express views or provide explanations.
- It should be annotated in pencil (date and subject) on the NGB Form 904-1 or computer generated supervisor's brief.

LETTER OF REPRIMAND

- It is disciplinary action which makes the technician aware of a violation (e.g. improper attitude, violation of agency rules).
- It can be issued when a counseling, warning, and oral admonishment have proven ineffective, or
- When the nature of violation warrants more than counseling, warning or oral admonishment, but does not warrant adverse action.
- A letter of reprimand must be cleared for procedural accuracy by the HRO before issuance.

ADVERSE ACTIONS

- There are only three types of adverse actions which may be taken against a technician:
    - Suspension (Includes indefinite suspension)
    - Change to a lower grade
    - Removal

The following checklists and examples may be used in applying TPR 752:

Letter of Reprimand Checklist

Reference: NGB TPR 752 and Negotiated Labor Agreement

As a minimum, a letter of reprimand must:

- Describe the violation in sufficient detail
- Tell how long the reprimand will be filed in the OPF
- Provide grievance rights
- Include a warning about further offenses

Adverse Action Checklist

References: NGB TPR 752 and Negotiated Labor Agreement

Step 1. Conduct an investigation IAW TPR 752 to find the relevant facts. You may utilize the checklist for an investigation provided below.

Step 2. Issue Proposed Adverse Action Notice. Notice must:

- Identify action being proposed
- State reasons for the action in specific and sufficient detail
- Provide rationale for penalty selection
- Contain a right to review material relied on (include this information only when there is material to be reviewed)
- Give right to reply information
- Explain right to excused absence to prepare (do not include if technician is not in a duty status)
- Give HRO assistance information
- Explain the next step in the adverse action process
- Be dated
- Be signed by appropriate supervisor/management official.

Step 3. Technician Replies to Proposed Notice

- Answer questions for deciding official and/or technician concerning witnesses, subject matter to be discussed, representation rights, etc.

{Step 4 continued on next page}

Step 4. Issue Original Decision. Decision must:

- State what action has been decided upon
- Include date action will be affected
- Reference the technician's replies
- Provide reasons for the decision
- Give HRO assistance information
- Provide appeal rights
- Be dated
- Be signed by appropriate supervisor/management official

Step 5. Process Administrative Appeal

- Appellate review: provide the State Adjutant General with background material and assistance
- Administrative Hearing: Request NGB Administrative Hearing Examiner from NGB-TN; prepare for the hearing

Step 6. Issue Final Decision. Decision must:

- Address three issues:

    1. Did the technician do what he/she was charged with?
    2. Will some discipline, based on the proven conduct, promote the efficiency of the service?
    3. Is the penalty appropriate?

- Include, if appropriate, information on corrective actions
- State that there is no further administrative review of the final decision

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JOB AID FOR CONDUCTING DISCIPLINARY INVESTIGATIONS

INFORM TECHNICIANS	*Anytime a supervisor observes a discipline problem developing, he or she must inform the technician that their actions are improper.* *When the actions of the technician appear to be in violation of agency policy, regulation, or law, the supervisor will inform the individual that an investigation will be conducted to determine if disciplinary or adverse actions will be initiated. The technician will be informed at this time of their right to present any information or evidence that supports their position. In the matter.* *An investigation may be required based on the supervisor's observations or an allegation of misconduct brought to the attention f the supervisor.*
CONDUCT INTERVIEWS	*Interview anyone who may have information about the situation being investigated.* *When there are witnesses to support a charge of misconduct, in accordance with TPR 752, a written statement from each witness should be secured as soon as possible; witness statements in defense of the individual being changed should be secured in the same manner.* *Technicians should be informed that failure to disclose material facts could result in disciplinary actions and failure to answer investigator's questions may be grounds for removal.* *The fact that management Is not able to advise a technician of specific charges does not justify his/her refusal to answer questions.* *Fifth Amendment protection against self-incrimination is not infringed by orders to answer questions in an investigation when there is no likelihood of criminal prosecution.*

ENSURE DUE PROCESS	*The individual being investigated for possible misconduct charges will be afforded an opportunity to secure information or evidence in support of their defense in the same manner as the investigation conducted by management. This will be accomplished by meeting with the technician and if requested, his/her representative. The technician's right ot present information or evidence in their defense will be explained during this meeting.*
DURING THE INTERVIEW PROCESS	*Any interviewee may request a representative the union if they reasonably believe that the examination may result in disciplinary action against the employee.* *The supervisor will meet and discuss the matter with the union representative, if requested, prior to reaching a decision concerning discipline or adverse action.*
REVIEW EVIDECE	*Management must ensure that all evidence discovered in the investigation is considered before making a decision concerning possible discipline or adverse actions.* *Management must support its reasons for discipline or adverse action by a preponderance of the evidence.*
MAKE DECISION	*Management must decide if the preponderance of the evidence supports the charge of misconduct. If the charge is supported by the preponderance of the evidence, then the supervisor should administer the appropriate discipline or adverse action.* *If the preponderance of the evidence does not support the charge, the technician should be informed that no action will be taken on the matter.*

IMPORTANT NOTE:

Supervisors must ensure that the provisions of TPR 752 and their labor agreement are followed prior to initiating any disciplinary or adverse action.

Letters of reprimand and adverse actions must be cleared by the HRO before issuance.

If you have questions concerning this job or need assistance in any are of discipline or adverse action, contact your Labor Relations Specialist in HRO.

DISCIPLINE AND ADVERSE ACTION SAMPLE MEMORANDUMS

Sample Letter of Reprimand

27 November 2004

MEMORANDUM FOR: MSG <*Person's Name*>, <*Person's Title*>
<*Office Symbol or Address*>

FROM: MSgt <*Supervisor's Name*>
<*Branch*> *Supervisor*
<*Office Symbol or Address*>

SUBJECT: Official Letter of Reprimand

USE TPR 752 for Guidance in discipline and adverse actions and ALWAYS seek HRO/ERS/LRS help for assistance when contemplating disciplinary actions.

Tell what this is and why, citing TPR 752.

1. I deem it necessary to take formal disciplinary action by officially reprimanding you in accordance with NGB Technician Personnel Regulation (TPR) 752. This letter of reprimand is warranted because of your <*example: "failure to observe written rules and regulations resulting in serious safety violations"*>. Specifically, the reason for this disciplinary action is:

Explain the details of the incident, be chronological and <u>be specific</u>!

On 21 Nov 04, you performed maintenance on aircraft XX-XXXX (C-17) leaving the item you replaced inside the nose wheel well of the aircraft. This item was found on 22 Nov 04 while the aircraft was taxiing. The aircraft was radioed in and a thorough FOD inspection inside the nose was completed. On 27 Nov 02, I notified you, <*Person's Name*>, of the severity of this violation, and that it could have resulted in a catastrophic accident. I informed you of the penalties for safety violations, and it was at this time that you admitted your carelessness. I also reinforced to you the necessity of following all safety procedures including, but not limited to, Local Operating Instruction XX-X and Air Force Instruction 21-101 par 7.1.2 on Foreign Object Damage (FOD).

Include an EAP paragraph.

2. Should personal problems be contributing to your misconduct, the Employee Assistance Program is available to you for appropriate consultation or referral. If you desire assistance with your problem, you should contact the [St NG] Federal Employee Assistance Program Coordinator, MSgt Helpful at DSN: 338-6430 or commercial: 404-624-6430.

Explain what may happen if the offense continues, how long the letter will remain on file (normally one year), grievance procedures and HRO POC.

3. This letter of reprimand constitutes the first offense for failure to observe written rules and regulations. Continued offenses of this type may result in a suspension or removal. At the discretion of the supervisor, this reprimand will remain on file as a temporary document in your personnel folder for a period of up to two years from the date of this memorandum. If you so desire, this letter of reprimand may be grievable through the state or negotiated grievance procedure<*for bargaining unit members*>. The HRO point of contact for procedural assistance in disciplinary actions is Maj Easy at (404) 624-6440 or DSN: 338-6440.

<*SUPERVISOR'S NAME*>
<*Rank and Branch*>
<*Title*>

I HEREBY ACKNOWLEDGE RECEIPT OF THIS OFFICIAL LETTER OF REPRIMAND.

Signed: _____ Date: _____
<*Person's Name*>

<u>TIPS/GOOD ADVICE!</u>
Make sure the employee acknowledges receipt of the counseling and it is highly recommended to offer union representation and also document their presence at the counseling.
All counseling should also be documented on the automated supervisor's brief and/or on the NGB Form 904-1.
DOCUMENT! – DOCUMENT! – DOCUMENT!

Sample Proposed Adverse Action Letter

MATES 10 November 2004

MEMORANDUM FOR SSG Imn B. Trouble, MATES

SUBJECT: Notice of Proposed Adverse Action

USE TPR 752 for Guidance in discipline and adverse actions and ALWAYS seek HRO/LRS help for assistance when contemplating disciplinary actions.

Tell what, and approximately when the action will be effective and why it is being taken.

1. This memorandum is official notification that I propose to suspend for a period of 40 hours (4 workdays) from your employment as a Heavy Mobile Equipment Repairer, WG-5803-08, Mobilization and Training Equipment Site (MATES), Ft. Stewart, State in accordance with Technician Personnel Regulation 752. The effective dates of this proposed suspension will be issued in the original decision. This suspension is for your second offense of AWOL. I have reviewed and considered all relevant factors associated with your case, and as a result I consider this suspension action warranted due to your continued failure to follow established leave procedures resulting in unexcused absences.

2. Specifically, The background and specific circumstances, which precipitated this proposed adverse action, are as follows:

Explain in detail the events leading up to the proposed adverse action - be chronological and very specific.

a) On 5 October 2004 you did not show up for work and did not call to request leave; you were counseled on the 904-1 (second offense) and issued a letter of reprimand on 6 May for failure to follow established leave procedures. You explained that you were sick and went to the doctor's. Your leave balance showed 0 sick leave balance, 0 annual leave balance and 50 hours of leave without pay used this year. In previous counseling sessions recorded on the 904-1 you were advised to bring a doctors excuse for any further use of sick leave and you have not complied with that directive.

b) On 11 October 2004 you again did not show up for work and claimed you were sick the next day but did not produce a doctor's excuse. You were listed as AWOL and suspended for a period of 10 hours (one workday). After repeated verbal and written warnings recorded in your work folder concerning abuse of leave, failure to follow established leave procedures, and not being ready, willing and able to work upon arrival, a more progressive form of discipline must be used.

c) On 15 November 2004 you did not show up for work and called in asking for sick leave (LWOP) well after the call-in time frame. You were advised that you were in violation of leave/call-in procedures and that you would have to produce a doctor's excuse for the requested sick leave. You could not produce a doctor's excuse, therefore you were placed in AWOL status for the period of absence. This second offense of AWOL has resulted in your proposed suspension for a period of 40 hours as explained in paragraph one.

Include a paragraph explaining efficiency and further penalties.

3. Both the Shop Foreman and myself have repeatedly counseled you on your leave and attendance related abuses and provided you with the steps necessary to correct these abuses. This suspension action will contribute to the efficiency of the service by enforcing regulatory compliance and ensuring the availability of personnel at the worksite. Continued conduct related abuses of this type will result in more severe adverse actions up to and including termination from your technician position.

Include a paragraph for EAP.

4. Should personal problems be contributing to your conduct or performance problems, the Employee Assistance Program (EAP) is available to you for consultation and appropriate referral. If you desire assistance with your problems, you should contact the State Program Coordinator, MSgt Helpful, Human Resource Office, COMM: (404) 624-6430, DSN: 338-6430. TPR 735, Employee Assistance Program, is the governing regulation for the EAP.

5. For your information and guidance, I have attached a copy of HRO Form 752-1, which explains in detail your reply rights regarding this Notice of Adverse Action.

ITREATM V. NICE

MSG, GA ARNG

MATES Supervisor

Attachment:
HRO Form 752-1

I acknowledge receipt of this proposed Notice of Adverse Action:

_____ _____

Technician Signature – SSG Imn B. Trouble Date

TIPS/GOOD ADVICE!

- Make sure the employee acknowledges receipt of the adverse action and it is highly recommended to offer union representation and also document their presence at the counseling.
- All adverse actions should also be documented on the automated supervisor's brief and/or on the NGB Form 904-1.

DOCUMENT! – DOCUMENT! – DOCUMENT!

REPLY RIGHTS - PROPOSED NOTICE OF ADVERSE ACTION

You have the right to reply to this proposed adverse action orally, in writing, or both. Should you elect to reply to this proposal, you have the right to be represented by an attorney or other representative of your choice. Your written reply must be submitted to the Deciding Official whose name, address and telephone number appear below:

Name: _____

Address: _____

_____

_____

Phone: Comm: (___)_____-_____ DSN: ____-_____

You may make arrangements for an oral reply by contacting the Deciding Official at the phone numbers listed above. The Deciding Official must receive your written and/or oral reply NOT LATER THAN _____20____.

You may request an extension of this deadline by providing your reasons, in writing (prior to the above date), to the Deciding Official who will either grant or deny your request. Full consideration will be given to any reply you submit.

You will be allowed eight (8) hours of official time to review the material relied on to support the reasons for the proposed adverse action, to secure affidavits, and to prepare a reply to this notice. You should arrange with your supervisor for the use of official time. This official time may be extended if you submit a written request to your immediate supervisor stating your reason for the extension. You will be issued a written original decision from the Deciding Official as soon as possible after: a) Your reply is received by the Deciding Official; or b) you do not reply by the date indicated above.

You may review the material relied upon to support the proposed adverse action by contacting the Deciding Official or the Human Resource Office (HRO) in [City]. You may contract Major Easy in the HRO for procedural assistance, alternatives available, and reply rights. You may telephone him at Comm: (404) 624-6440 or DSN: 338-6440. The address of the [St NG] Human Resource Office is 935 East Confederate Ave, SE, P.O. Box 17965, Anywhere, ST 30316-0965.

HRO Form 752-1
August 2002

Sample Original Decision To Proposed Adverse Action Letter

USE TPR 752 for Guidance in discipline and adverse actions and ALWAYS seek HRO/ERS/LRS help for assistance when contemplating disciplinary actions.

MATES 11 December 2004

MEMORANDUM FOR SSG Imn B. Trouble, MATES

SUBJECT: Original Decision Letter of Proposed Adverse Action

Reference the proposed adverse action.

1. On 27 November 2004, your first line supervisor, MSG Itreatm V. Nice, proposed that you be suspended from your technician employment as a Heavy Mobile Equipment Repairer, WG-5308-08, Mobilization and Training Equipment Site (MATES), Ft. Stewart, ST.

Reference TPR 752, your position and time-frame for replies

2. In accordance with National Guard Bureau Technician Personnel Regulation 752, I am the deciding official for this adverse action. As deciding official, I am required to issue an original decision on the Proposed Adverse Action. HRO Form 752-1, Reply Rights was an attachment to the proposed adverse action. This form stated that your written and /or oral replies to the proposed adverse action must be received by me (the deciding official) not later than 15 December 2002.

3. On 8 December 2004, you came to my office and verbally provided an explanation for your actions. You did not supply any written justification or doctor's excuses for your absences and failure to follow established leave procedures resulting in your second offense of AWOL. After a careful review of all documentation, testimony, and facts surrounding this matter, I find that there is a preponderance of evidence that you did in fact commit the offenses outlined in the proposed adverse action. I have decided that your suspension is for just cause and will promote the efficiency of the service. Therefore, I sustain the proposed suspension action.

Reference replies and issue original decision. It could be a lesser penalty or stay the same.

4. You will be suspended from your technician employment for a period of 40 hours (4 workdays), effective January 16th, 2005 through January 19th, 2005.

5. For your information and guidance, I have attached a copy of HRO Form 752-2, which explains, in detail, your reply rights for an original decision.

IM V. TOUGH
MAJ, GA-ARNG
MATES Superintendent

State the effective dates of the action and reference 30 day period if removal action (see TPR 752).

Atch
HRO Form 752-2

I acknowledge receipt of this adverse action original decision:

_____ _____

Technician Signature – SSG Imn B. Trouble Date

TIPS/GOOD ADVICE!

Make sure the employee acknowledges receipt of the original decision and it is highly recommended to offer union representation and also document their presence at the issuance. All adverse actions should also be documented on the automated supervisor's brief and/or on the NGB Form 904-1.

DOCUMENT! – DOCUMENT! – DOCUMENT!

APPEAL RIGHTS – ORIGINAL DECISION OF ADVERSE ACTION

If you consider this adverse action improper, you may appeal the decision by requesting an Appellate Review by the Adjutant General or an Administrative Hearing, but not both.

The Appellate Review involves an overall review of the official adverse action case file maintained in the Human Resources Office (HRO), together with any additional information you may wish to provide.

An Administrative Hearing affords you the opportunity to have a National Guard Hearing Examiner gather all available facts through an administrative hearing and then provide findings and recommendations to the Adjutant General who will then issue the appellate decision.

Should you elect to appeal the decision, you have the right to be represented by an attorney or other representative of your choosing.

Your appeal must be in writing stating your reasons for contesting this action together with such proof and pertinent documents, as you may desire to submit. The appeal should be addressed as follows:

The Adjutant General
ATTN: Human Resources Office
P.O. Box 17965
Anywhere, ST 30316

Your appeal must be received by (dd--mmm--yyyy): _____. Consideration will be given to extending this date if you submit a written request prior to the above date to the Adjutant General stating your reasons for desiring the additional time.

The Adjutant General will render the final decision as soon as possible after the appellate review has concluded or after review of the hearing examiner's report and recommendation. A final decision by the Adjutant General will cancel the adverse action, sustain it, or substitute a less severe penalty. The right to appeal extends no further than the Adjutant General of [State].

Major Easy, HRO Labor Relations Specialist, can provide information regarding procedural assistance and appeal rights. He may be contacted at commercial (404) 624-6440 or in person at Building 21, 935 E. Confederate Avenue, S.E., Anywhere, ST.

HRO Form 752-2
August 2002

DISCIPLINARY AND ADVERSE ACTIONS – THE HEARING…
NGB Administrative Hearing Examiner System – from TPR 752

6-1. Hearing Examiner Program

a. The NGB Hearing Examiner program was established to provide a centralized register of qualified individuals to conduct administrative hearings and prepare the reports of findings and recommendations for the TAG.
…

6-2. Requesting an Examiner A qualified hearing examiner register is maintained at NGB-TN. States requiring an examiner request a roster from NGB-TNL. NGB-TNL will provide a list of all currently qualified and available Hearing Examiners to the requesting HRO. States requesting Hearing Examiner support are expected to pay the expenses of the individual selected. A hearing examiner may not serve in the state in which they are employed. The appellant (or spokesperson) does not have a right to concur/non-concur with the selection of the specific hearing examiner.

Chapter 7

ADMINISTRATIVE HEARING

7-1. Preparation for the Hearing

a. The HRO requests an NGB Hearing Examiner IAW procedures outlined in Chapter 6. Other responsibilities of the HRO include;

(1) Providing written notification to the technician of an examiner's selection with an information copy sent to the examiner.

(2) Establishing, with all parties, a mutually acceptable date, times, and places for the pre-hearing conference and the hearing. The examiner resolves any conflicts with those factors which may arise. The location should be as close to the work site as possible, accessible by all parties, relatively quiet, and neutral to both parties.

(3) Notifying the technician and/or representative in writing of the mutually acceptable date, time, location of the pre-hearing conference and hearing. (Information copy must be sent to the examiner.)

(4) Providing a case file to the examiner and the technician or his/her representative at least three weeks in advance of the hearing. Files must be indexed and include, as a minimum, the proposed adverse action notice and all the material relied upon; a technician's written reply; summary of oral reply; and the original decision.

(5) Arranging for a court reporter (verbatim transcript).

(6) Providing examiner's requests for supplies, equipment, and hearing room lay-out.

(7) Arranging for examiner's lodging, transportation, and travel order fund cite. The Hearing Examiner's travel, lodging and per diem expenses are provided by the requesting state.

(8) Arranging for the appearance of agency witness called by the management or the technician. A technician has the right to secure the attendance of agency witnesses; problems relative to the availability of the agency witness will be resolved by the examiner.

7-2. Pre-Hearing Conference

a. A pre-hearing conference is an informal meeting of the parties involved and is normally held the day before the hearing. During the conference, the examiner explains the hearing process, helps to identify problems, discusses responsibilities and rights, reviews case files, identifies documents, obtains stipulations, and assists in settlement offers.

b. It is recommended that the pre-hearing conference and hearing are recorded. If the pre-hearing conference is not recorded, the results of the pre-hearing conference are summarized by the examiner and read into the record when the actual hearing begins. The pre-hearing conference should be recorded, the hearing must be recorded.

7-3. Hearing Procedures

a. The purpose of the administrative hearing is to develop fully all the facts surrounding the issues of the case. The administrative hearing is not a court of law. It is not subject to the procedural and substantive rules which govern conduct of trials because its purpose is not to find the technician guilty or innocent. The hearing is conducted to determine three issues:

(1) Did the technician do what he/she was charged with? This is the factual determination using the preponderance of the evidence standard.

(2) Will some discipline, based on proven conduct, promote the efficiency of the service? This is a judgmental determination based on the record.

(3) Is the penalty appropriate? The original choice of penalty will not be disturbed unless the record indicates the choice to be arbitrary, capricious, or otherwise unreasonable in light of the proven conduct. The Hearing Examiner may not recommend a more severe punishment.

b. The hearing will be closed to the public unless the technician and management agree to hold a public hearing. Typically only the examiner, management's representative (with technical advisors), technician, technician's representative (with technical advisors), and the individual recording the proceedings will be present at a closed hearing. However, collective bargaining agreements may require others to be included.

c. At a public hearing, the examiner decides the number of people allowed. Disputes over the attendance will be resolved by the examiner.

d. A hearing must be recorded verbatim with a copy of the transcript provided free of charge to the technician.

e. The examiner directs the hearing proceedings and has authority to take whatever action is necessary to ensure an equitable, orderly, and expeditious hearing. The order of business is:

(1) Examiner calls the hearing to order, identifies the nature of the hearing, names the participants, and makes other statements needed for the record.

(2) Management's representative makes opening statement.

(3) Technician's representative makes opening statement or may defer until after management's representative presents witnesses and evidence. (A technician may represent himself/herself, although it is recommended in the interest of the individual and to facilitate the hearing that a representative be selected).

(4) Management's representative presents witnesses and evidence.*****

(5) Technician's representative presents witnesses and evidence.*****

(6) Closing statements by management representative.******

(7) Closing statements by technician representative.******

(8) Examiner prepares to close hearing.

(9) Examiner closes and adjourns hearing.

***** Both sides have the right to cross-examine witnesses.

** Either side may request the opportunity to submit post hearing briefs in lieu of closing arguments. This is usually done when the hearing has been lengthy, when the issues are numerous or complex, or when questions of law or regulation are involved. Requests from the technician's representative are automatically granted. Requests from management must be reviewed carefully by the examiner with due weight given to what effects a delay will have on the technician.

THE HEARING EXAMINER'S REPORT

7-4. Hearing Examiner's Report of Findings and Recommendations

a. When the examiner receives the transcript, the report is prepared and finalized within 45 calendar days of the receipt of the transcript. The examiner completes six processes when preparing the report.

(1) The charges are reviewed and evidence that supports each charge is identified and given appropriate weight.

(2) Conflicts in testimony are resolved.

(3) Credibility of witnesses is determined.

(4) A check for procedural compliance is made.

(5) Conclusions are drawn on each charge.

(6) The appropriateness of the penalty is determined.

b. The report is formatted into nine sections:

I Introduction
II Case Summary
III Compliance with Procedural Requirements
IV Management's Position
V Technician's Position
VI Issues Considered
VII Conclusions
VIII Discussion (Optional)
IX Recommendations

c. The original report is addressed to the TAG and mailed to the HRO with the case file and transcript. A copy of the report is also sent to the technician and to NGB-HRL. A final decision is issued per chapter 5-6.

CONFLICT RESOLUTION AND COMMUNICATION BASIC TRAINING

Problem or Person?

- ✓ **ATTACK THE PROBLEM NOT THE PERSON:**
  - Define the problem
  - Explore each person's perception of the problem
  - Try to understand and respect each point of view without judging
  - Remember that we all come from different backgrounds and different socializations and that we must understand and value our diversity – it is our diversity that makes us strong
- ✓ **USE GOOD COMMUNICATION SKILLS INCLUDING:**
  - *LISTENING* – Use "Active Listening" letting the communicator know you are genuinely interested. Do not interrupt. Let them express why their feelings are important to them.
  - *SUMMARIZING* – Paraphrase to let the communicator know what you think they said
  - *CLARIFYING* – Ask questions when you are unsure of the communicator's message
  - *BODY LANGUAGE* – You should be calm, relaxed and attentive. Make eye contact and nod occasionally to signify you are getting the message.
  - *BE RESPECTFUL* – Treat everyone with respect. There is not one person who wants to feel judged or personally attacked.

Interests or Positions?

- ✓ **CONCENTRATE ON INTERESTS, NOT POSITIONS:**
  - The position is the outcome you are interested in getting
  - The interest is why you want that outcome
  - Interests that are involved in conflicts are usually related to our basic needs. When we focus on interests instead of positions we can start to find solutions.

{Continued on next page}

The "Ideal" Solution

- ✓ **THE IDEAL SOLUTION IS A WIN-WIN AMONG THE FIVE PRIMARY WAYS TO SETTLE CONFLICT:**
  - COMPETITION as on a playing field is an option that always results in WIN-LOSE
  - ACCOMMODATION where you yield to the other person results in LOSE-WIN
  - AVOIDANCE is one of the most common ways to react and results in LOSE-LOSE
  - COMPROMISE where you get some of what you want is like a WIN-LOSE/LOSE-WIN
  - COLLABORATION is the best, most satisfying, and hardest goal to achieve – a WIN-WIN
- ✓ **COLLABORATE TO SOLVE THE PROBLEM FAIRLY STRIVING FOR THE WIN-WIN SOLUTION:**
  - You should identify areas of agreement, define and explore alternatives, and select solutions
  - Both sides must be willing to resolve the issue, get to the root of the problem, and empathize
  - Hidden agendas, dishonesty, or lack of trust will derail your efforts to resolve the conflict
  - A fair solution respects the interests and positions of both sides

More Tips on – CONFLICT RESOLUTION and COMMUNICATION

WORKING IT OUT TOGETHER…

The first step towards harmony in our work and personal life is to learn how to solve our everyday problems.

- ✓ **CONFLICTS HAPPEN** – Conflicts are a normal part of life. How we deal with these conflicts can make a big difference. Often when people resolve conflicts, one person ends up a winner, and one loses out. This may solve the problem for the moment, but resentment and bad feelings can cause more problems later.
- ✓ **EVERYBODY CAN WIN** – Another way to look at conflicts is to try to find a WIN-WIN solution, in which both sides can benefit. In this way, conflicts are turned into opportunities to grow and make things better than before. This approach is the cornerstone of "conflict resolution" – one of the most important tools for bringing harmony into our personal lives, our work sections and our organization.

PROBLEM SOLVING TERMS AND TOOLS…

- ✓ **COMMUNICATION** – Conflicts are often caused by problems in communication. One person may have misunderstood what the other person has said. Or the other person may not have said what they meant to say. Sometimes when we're angry we don't hear what the other person is saying. Sometimes when there is a conflict, people do not tell each other, which causes even more conflict. Good communication skills are an important part of resolving conflicts.
- ✓ **LISTENING** – It's important to listen carefully. Your "body talk" sends a message that you are listening. Keeping eye contact, leaning closer, nodding your head when you understand a particular point, and ignoring distractions that are going on around you are some of the ways to send the right body messages.
- ✓ **SUMMARIZE** – When a person is finished expressing a thought, summarize the facts and emotions behind what they have said so that they know you have understood what they've said and how they are feeling.

- ✓ **CLARIFY** – Ask questions to clarify or make clearer different parts of the problem to make sure that you fully understand the other person's perspective.
- ✓ **GOOD SPEAKING SKILLS** – When you speak, try to send a clear message, with a specific purpose, and with respect to the listener. Speak about how you are affected by the problem.
- ✓ **COMMUNICATION SIDETRACKERS** – Don't interrupt, criticize, laugh at the other person, offer advice or bring up your own experiences, or change the subject.
- ✓ **WIN-WIN OPTIONS** – An idea or suggestion in which both sides can benefit is called a Win-Win option. The idea should help both sides.
- ✓ **BRAINSTORMING** – The first step in problem solving is to come up with as many ideas as possible. This is called brainstorming. During this process, any idea that comes to mind should be expressed and written down. Don't judge whether the ideas are good or bad, or even discuss the ideas. Just try to come up with as many solutions as possible.
- ✓ **FIND A FAIR SOLUTION** – Then go through the ideas using fair criteria to see which idea might be best. Using fair criteria means to judge each idea with both people's interests in mind. Try to use reason and not emotion to judge an idea, respecting each person's difference in perception.

MORE WAYS TO PRACTICE CONFLICT RESOLUTION…

- ✓ **NEGOTIATION** – Negotiation is a communication process in which people try to work out their conflicts in a peaceful way using conflict resolution techniques.

- ✓ **MEDIATION** – Sometimes people who want to work out a conflict just can't seem to agree on any way to work it out. They may want another person to help them solve their problem. A mediator is a person who helps two sides to work out their problems peacefully. The mediator helps those in conflict to focus on the problem and not blame the other person, to understand and respect each other's views, to communicate their feelings and what each is really saying, and to cooperate together in solving the problem. Mediators are peacemakers.

- ✓ **GROUP PROBLEM SOLVING** – Problems can also be worked out together in a group. Often group problem solvers sit in a circle, so that all members are equals. The same conflict resolution principles are used: they focus on the problem not on assigning blame to any person; they take turns sharing their point of view, and listening (without interrupting) to all of the other points of view; all members must show respect and not criticize other members or their ideas.

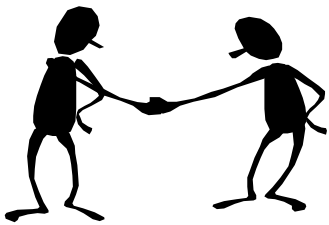
10 STEP COMMUNICATION PROCESS…

Try these suggestions to get your message across:

1. **TALK DIRECTLY:** If there is no threat of physical violence, talk directly to the person with whom you have the problem.
2. **CHOOSE A GOOD TIME AND PLACE:** Discuss the conflict in a quiet place, when you and the other person are not busy or rushed.
3. **PLAN AHEAD:** Think about what you want to say ahead of time. Be able to state clearly what the problem is and how it affects you.
4. **GIVE INFORMATION:** For example, say something like: "When your car blocks my driveway, I get angry because I can't get to work on time." Try not to say things like: "You are blocking my driveway o purpose just to make me mad!"
5. **DON'T BLAME OR NAMECALL:** Blaming and name-calling will only antagonize the other person, and make it harder for him or her to understand your concerns.
6. **LISTEN:** During the discussion, relax. Give the other person a chance to tell his or her side of the story completely, and try to learn how he or she feels about the situation.
7. **SHOW YOU ARE LISTENING:** Although you may not agree with what is being said, tell the other person you hear what he or she is saying, and are glad you are discussing the problem together.
8. **TALK IT ALL THROUGH:** Once you start, get all of the issues and feelings out into the open. Don't leave out the part that seems too "difficult" to discuss or too "insignificant" to be important. Your solution will work best if all the issues are discussed thoroughly.
9. **WORK ON A SOLUTION:** When you have reached this point in the discussion, *BE SPECIFIC*.
10. **FOLLOW THROUGH:** Agree to check with each other at specific times to make sure the agreement is still working. Then really do it.

HINTS AND TIPS FOR DE-ESCALATING A CONFLICT…

- ***Take a deep breath to stay relaxed.***
- ***Look the other person in the eye, with both of you sitting or standing.***
- ***Speak softly and slowly.***
- ***Keep your legs and arms uncrossed.***
- ***Do not clench your fists or purse your lips.***
- ***Keep reminding yourself – "We can find a win-win resolution to this," and remind the other person of this too.***
- ***If necessary, ask for a break to collect your thoughts or release pent-up tension.***
- ***Give "I messages." – Paraphrase what the other person has said, asking for clarification as necessary.***
- ***Watch your language – Words that escalate a conflict are: never, always, unless, can't, won't, don't, should, and shouldn't. Words that de-escalate a conflict are: maybe perhaps, sometimes, what if, it seems like, I feel, I think, and I wonder.***
- ***Really listen to what the other person is saying, with the goal of truly understanding that person's point of view.***
- ***Affirm and acknowledge the other person's position.***
- ***Ask questions that encourage the other person to look for a solution. Ask open-ended questions rather than ones that evoke a yes or no response.***
- ***Keep looking for alternative ideas to resolve your dispute so that both of you have your needs met.***



ADVANCED TOPICS IN FEDERAL LABOR RELATIONS – FROM FAS

DEFENSE CIVILIAN PERSONNEL MANAGEMENT SERVICE – FIELD ADVISORY SERVICE

I. Employee Rights

- Form, join, or assist a labor organization.
- Not form, join, or assist a labor organization.
- Act as a representative for labor organization.
  - Shop Steward or Chief Steward
  - Local President
  - Regional or National Representative
- As representative, present views of labor organization to Agency head, other Officials of Executive Branch, or Congress.
- Bargain collectively through labor organization with respect to conditions of employment.
- Exercise these rights without fear of penalty or reprisal from Agency
- Management.

II. Bargaining Unit

A. Definition

A group of employees who have a common interest, and are represented by a labor organization in their dealings with Agency management.

B. Exclusions

- Supervisors
- Management officials
- Confidential employees
- Professional employees, unless a majority of professional employees vote for inclusion in the unit.
- Employees engaged in:
- Personnel work in other than a purely clerical capacity
- Investigators directly affecting an agency's internal security
- Administering the provisions of Title 5, Chapter 71
- Work that directly affects national security

C. Definition of Supervisor *(Labor Definition as Opposed to Classification)*

A person who has the authority to take, or effectively recommend taking, any of the following actions with respect to at least *one* employee:

- Hire
- Layoff
- Promote
- Remove
- Recall
- Direct
- Discipline
- Transfer
- Adjust Grievances
- Suspend
- Assign
- Furlough
- Reward

The definition of a supervisor under labor law (Chapter 71 of Title 5 of the US CODE) means the authority to perform any supervisory function above as it pertains to the supervision of a single employee. This definition of supervisor is distinct from the classification definition, which requires the supervision of more than a single employee.

III. Union Rights and Responsibilities

A. Rights

- Exclusive representative of employees in bargaining unit and entitled to act for and negotiate collective bargaining agreements for all employees in the unit.
- Be given the opportunity to be represented at any formal discussion.
- Be given the opportunity to be represented at any meeting with unit employees in connection with an investigation if the employee reasonably believes the meeting could result in disciplinary action and the employee requests union representation. (Weingarten Discussions)
- Be given the advance notice of any proposed changes to established conditions of employment and an opportunity to negotiate over these proposed changes absent any clear and unmistakable waiver of this right.

B. Responsibilities

- Represent interests of all bargaining unit members, regardless of union membership.
- Negotiate with management in a "good faith" effort to determine conditions of employment.

IV. Official Time

A. Definition

Duty time that is granted to union representatives to perform union representational functions, without charge to leave or loss of pay, when the employee would otherwise be in a duty status. Time is considered to be hours of work. IAW Office of Personnel Management (OPM) memorandum, 3 Nov 03, federal agencies are required to report the number of hours of official time used by employees to perform union-related activities. Supervisors are responsible for recording the actual official time used and the type of official time used, when completing time and attendance records. Supervisors must track total time using the following three categories: 1) negotiations (code BA); 2) labor-management relations (code BD); and 3) grievances and appeals (code BK). OPM is working with the Defense Finance and Accounting Service (DFAS) to revise the time and attendance system to allow supervisors to track official time for future fiscal years in four different categories. Stay tuned for updated OPM guidance.

B. When is official time permitted?

It can be permitted for representational functions such as:

- Contract or mid-term negotiations
- Representing employees who file grievances
- Any proceeding before the Federal Labor Relations Authority
- For any employee representing an exclusive representative or any employee represented by an exclusive representative in any amount the agency and the exclusive representative agree to be reasonable, necessary, and in the public interest

It is not permitted for conducting union's internal business, such as:

- Soliciting membership
- Collecting union dues
- Any matters relating to internal management and structure of union

Overtime for official time is not permitted because:

- Representation is for the union and it is not for the primary benefit of the government as an employer
- Time spent performing representational business outside an employee's normal workday is not considered the performance of hours of work within meaning of 5 USC §§ 5542 – 5544, the Fair Labor Standards Act, and 5 CFR 551.104 and 551.424
- Exception to overtime prohibition provides overtime on official time if the employee/representative is already on overtime duty status

V. Furnish Information

Right to Information

Agency is obligated to furnish to the exclusive representative, upon request and, to the extent not prohibited by law, data -

- which is normally maintained by the agency in the regular course of business;
- which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining; and
- which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors,
- relating to collective bargaining....

Unlike Freedom of Information Act (FOIA) requests, information must be provided free of charge. If you receive a request for information from a union representative, contact your Labor Relations Specialist immediately.

Note: The processing of information requests may be complicated by legal considerations. Evaluate the information request and determine if there are any Privacy Act implications. For example, does the request include the release of social security numbers, home addresses or names of individuals who received disciplinary action? If so, personal identifiers may be removed or redacted or not releasable.

Further, the union is required to state a "particularized need" for any information it seeks. If none is stated, you should request a clarification from the union of the need for the information in reference to its representational function. General, vague statements of the need for information is usually not sufficient to require release of the information. The need must be specific and related to the union's representational function.

VI. Formal Discussion

A. Definition

Discussion between one or more representatives of the Agency and one or more employees in the unit concerning any grievance or any personnel policy or practice or other general condition of employment.

B. Criteria (See 10 FLRA No. 24 (1982), See also 52 FLRA No. 17 (1996))

- Whether the individual who held the discussion is merely a first-level supervisor, or is higher in the management hierarchy;
- Whether any other management representative attended;
- Where the meeting took place;
- How long the meeting lasted;
- How the meetings were called (i.e., with formal advance written notice, or more spontaneously and informally);
- Whether a formal agenda was established for the meeting;
- Whether the employee's attendance is mandatory; or
- The manner in which the meetings were conducted (i.e., whether the employee's identity and comments were noted and transcribed).

C. What is a discussion?

The term "discussion" in the Statute is synonymous with "meeting and no actual discussion or dialogue need occur for the meeting to constitute a formal discussion within the meaning of the Statute. See 37 FLRA No. 60 (1990).

D. Union's Role.

- The opportunity to be represented at a formal discussion means more than merely the right to be present. The right to be represented also means the right of the union representative to comment, speak and make statements. See 47 FLRA No. 11 (1993).
    - On the other hand, this right does not entitle a union representative to take charge of, usurp, or disrupt the meeting. See 38 FLRA No. 61 (1990).
    - Comments by a union representative must be governed by a rule of reasonableness, which requires the respect for orderly procedures. See 47 FLRA No. 11 (1993).

E. Discussions That Are Not Formal

Work assignments; Progress reviews; Performance appraisals; Performance counseling; Counseling on conduct.

F. Discharging Obligation

- Give union reasonable advance notice of meeting (time, date, place, and subject to be discussed).
- Provide union opportunity to attend.

G. Questions and Answers

- **Q:** If an employee approaches me and asks a question about work rules or personnel practices, is this formal discussion or meeting?
  - **A:** Under normal circumstances it is not. Since the employee initiated the conversation in an informal setting, the supervisor is free to respond to the employee's question. However, if, during the conversation, the supervisor establishes or changes general personnel practices or work rules the meeting or discussion could be considered formal. In addition, any discussion you have with the employee concerning a grievance he or she may have filed is a formal meeting.
- **Q:** Suppose I want to call an employee's attention to an existing work procedure—is that a formal meeting or discussion?
  - **A:** The discussion of work procedures, assignments, or performances is normally not a formal meeting or discussion under the law. Nor is counseling an employee regarding individual performance. For example, reminding an employee to wear safety equipment is not a formal meeting or discussion under the law.
- **Q:** I have decided to hold a formal meeting or discussion. What happens next?
  - **A:** Contact your Labor Relations Specialist to find out the method of inviting the union as well as the appropriate union official to be invited. Having learned that, then an invitation should be extended to the union. .
- **Q:** If I plan to hold a formal discussion or meeting with employees, do I have to tell the employee that he or she has a right to union representation?
  - **A:** Your obligation is to tell the union of the scheduled meeting or discussion and give the union the opportunity to be present. You do not have to tell the employee of the union's right to attend.
- **Q:** If the employee does not want a union representative at a formal discussion or meeting but the union demands to be present, do I allow the union representative in the meeting or discussion?
  - **A:** Yes. Since the employee does not want to be represented by the union the union representative is representing the interests of the bargaining unit.

VII. Investigative Meeting/Weingarten

A. Definition

A union must be given the opportunity to be represented at an examination of a unit employee by an agency representative in connection with an investigation, if:

- The employee reasonably believes the examination may result in disciplinary action; and
- The employee requests representation.

Note: Do not forget the requirement to provide an annual Weingarten posting either via bulletin boards or a commonly accessible web posting.

B. Management's Obligations

In all cases where the employee requests union representation, contact your Labor Relations Specialist for guidance and assistance. Some possible options would include:

- Stop discussion; continue investigation by other means, which do not involve interviewing bargaining unit employees.
- Temporarily stop meeting to allow union representative to attend.

C. Union's Role

- Ask relevant questions.
- Assist employee to answer.
- Cannot answer questions, break up meeting, or prevent Agency from carrying out investigation.

D. Questions and Answers

- **Q:** Does the interview or examination have to occur in connection with a formal investigation?
  - **A:** No, an "investigation" occurs even when a supervisor seeks information to determine whether discipline should be taken against an employee. For example, an employee is suspected of being late for work, and the supervisor calls him or her into the office to determine if that is the case and, if so, why.
- **Q:** If I choose to conduct the investigatory interview with a union representative present, to what extent must I allow the union representative to participate in the interview?
  - **A:** The Supreme Court has said that the:
    - Purpose of the union representative is to assist the employee by clarifying facts or bringing out favorable information.
    - Employer may insist on hearing the employee's account of the incident.
    - Employer need not permit an argument to develop with the union representative.
    - Employer has no duty to bargain with the union representative.
- **Q:** Does this mean that I can force the union to be quiet during the interview?
  - **A:** Absolutely not. Although you may insist that the employee, not the union representative, answer your questions, you must allow the union representative an opportunity to clarify facts or bring out favorable information.
- **Q:** What do I do if the union representative becomes so argumentative as to completely disrupt the interview process?
  - **A:** Warn the union representative and employee that if union representative continues to disrupt the meeting, you will be forced to end the interview and make your disciplinary decision on the basis of other information (without the benefit of the employee's input).

VIII. Management Rights

A. 5 U.S.C. § 7106(a) reserves to Management the right to:

- Determine the Agency's mission, budget, organization, number of employees, and internal security practices;
- Hire, assign, direct, lay off, and retain employees;
- Suspend, remove, reduce in grade or pay, or discipline employees;
- Assign work, make determinations with respect to contracting out, and determine the personnel by which operations will be conducted;
- Select and appoint employees from appropriate sources; and
- Take whatever actions may be necessary to carry out the Agency mission during emergencies.

B. Decisions to act in these areas are management's prerogative and the union cannot negotiate on any of these rights. However, procedures for the exercise of these rights and arrangements that affect employees may be subject to negotiation.

C. *Subject to Executive Order 12871*, and its rescission by Executive Order 13203 , 5 U.S.C. § 7106(b)(1) are "permissive" rights that Management <u>may elect(management's option)</u> to negotiate over:

- Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty.
- Numbers of employees is defined as the amount of employees or positions assigned to a particular subdivision, work project or tour of duty.
- Types of employees is defined as employees or positions that are assigned to perform work in a particular subdivision, work project or tour of duty.
- Grades of employees are related to types of employees. While the FLRA has not specifically defined "grades," it usually concerns employees or positions at already established grade levels that are assigned to perform work in a particular subdivision, work project or tour of duty. However, union cannot negotiate on classification of positions or organizational structure.
- Organizational subdivision is defined as an organizational part or segment.
- Tour of Duty is defined as hours of the day and days of the administrative workweek an employee is regularly scheduled to work.
- Work Project is defined as a particular job or task.
- The technology, methods, and means of performing work are;
    - Technology is defined as the technical method used in accomplishing or furthering the performance of the agency's work.
    - Method is defined as the way in which an agency performs its work (how).
    - Means is defined as any instrumentality including any agent, tool, device, measure, plan or policy used by the agency for accomplishing or furthering the performance of its work.

Keep in mind that electing to negotiate over "permissive subjects" may already have been decided by the head of your agency. Check to see if that is the case. In most cases, it is not advised to negotiate permissive subjects.

IX. Making Changes In Conditions of Employment

A. Management's Role

When management wants to make a change that affects conditions of employment of bargaining unit employees, the union must be given ***reasonable advance notice*** of the proposed change. Normally, your collective bargaining agreement will outline how much, if any, specific advance notice is required with your union when making changes that affect conditions of employment of bargaining unit employees.

B. Recognition of Obligation

- Does the decision produce a change or will the decision continue to use an existing way of doing things?
- Does the change affect bargaining unit employees?
- Does the change affect conditions of employment?
- Is the change significant?

X. Contract Administration

A. Definition

How the terms of the labor agreement will be interpreted, applied, and enforced.

B. Collective Bargaining Agreement

- Document that establishes the framework for labor-management relations.
- Contains those working conditions mutually agreed to by union and management.

C. Contract Interpretation Principles

- Administer agreement consistently with the intent of the parties whom negotiated the agreement.
- Language of agreement
- Bargaining history
- Past practice
- Concern condition of employment
- Clear and consistent
- Long standing
- Accepted by both parties
- Not contrary to law, regulation, collective bargaining agreement

D. The Union Steward

The union steward is an employee who serves as a representative of the union at a specific worksite. The stewards may be elected by union members or appointed by officers of the union.

The steward's duties are of two kinds:

1. Representing the union and bargaining unit employees in dealing with management. These are called representational activities and include handling grievances, policing the contract, keeping employees informed of working condition changes, and meeting with management. Stewards may be granted official time, without charge to leave, for these representational activities. The amount of time granted is negotiable.
2. Conducting internal union business such as participating in elections of union officials, soliciting membership, collecting dues and attending union meetings. The use of official time for conducting internal union business is prohibited by Title V. Such activities can only be done on non-duty time.
    - ❖ For representational activities, management should recognize that fellow union members place the steward in a position of trust and should accord the steward the cooperation and respect necessary in order for the steward to do an effective job.
    - ❖ Since stewards are responsible for representing the union and all bargaining unit employees, it is important that they have enough time to carry out representational responsibilities and have access to bargaining unit employees. At the same time, the steward, as an employee, is responsible for performing the assigned duties of his or her position. The goal in specifying a steward's activities in the contract should be to balance the steward's responsibility for representing the union and bargaining unit employees with management's primary responsibility for mission accomplishment.

E. The Supervisor-Steward Relationship

Supervisors and stewards play an extremely important role in determining whether the labor-management relationship is a good or bad one. On a day-to-day basis, it is the supervisor who has primary responsibility for administering the contract and the steward whom has primary responsibility for policing the administration. The supervisor and the steward:

- ❖ Must know the agency's personnel policies, regulations, and the contract.
- ❖ Must understand and accept each other's role.
- ❖ Are under pressure from both sides and must try to resolve problems without violating the contract or going beyond the intent of labor-management policies.

XI. Negotiated Grievance Procedure

A. Definition

Grievance means any complaint:…

- By any employee concerning any matter relating to the employment of the employee;
- By any labor organization concerning any matter relating to the employment of the employee;
- By any employee, labor organization, or agency concerning the effect of interpretation or a claim of breach of a collective bargaining agreement; or
- Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

B. Exclusions

- Any claimed violation of 5 U.S.C. § 7321 (relating to prohibited political activities);
- Retirement, life insurance, or health insurance;
- A suspension or removal under 5 U.S.C. § 7532 (national security);
- Any examination, certification, or appointment; or
- Classification of any position that does not result in the reduction in grade or pay of an employee.

Note: *In the National Guard, a grievance procedure may not cover Title 32 Section 709(f) actions. Such actions include reduction in force, removal, reduction in grade, suspension or furlough. A right of appeal which may exist for these actions shall not extend beyond the Adjutant General of the jurisdiction concerned.*

C. Procedures

- Assure union right to present and process grievances on behalf of itself or any unit employees;
- Assure an employee the right to present grievances on his/her behalf, and assure the union the right to be present during the grievance process;
- Provide for final and binding arbitration; and
- Provide for settlement of questions of arbitrability.

D. Grievance Handling

- Before meeting
  - Inform union
  - Ensure privacy
- Set the tone - questions only
  - What's the problem?
  - What are the facts?
  - Who? What? When? Where? Why?
  - What (exactly) do you want?
  - Why are you entitled to that?
  - Where in the Contract/Law/Regulation does it say that?
- Offer no resolutions at the meeting

- Investigate
  - Check the facts.
  - Check the Contract/Laws/Regulations
  - What have other grievance decisions said?
  - What have arbitrators said?
  - Is it a "true" practice?
  - What does management want to do?
  - What will it cost to fight?
- Make a timely decision (contract timeframe for grievance response)
- Be wary of partial relief.
- Is it grievable?
- If you agree to settle the grievance, grievance must be dropped.
- Things to avoid
  - Little or no research
  - Rubber-stamping
  - Personality clashes and power struggles
  - Giving the farm away to make the grievance disappear.

E. The Steward's Role in Processing a Grievance.

- One of the steward's most important roles is to handle grievances.
- Although the supervisor exercises certain authority over the stewards as an employee, when the supervisor and the steward discuss grievances, the steward acts as an official representative of the union.
- Stewards are trained, as are supervisors, to settle a grievance as close to the source of the dispute as is possible. Like supervisors, they have to live with any settlement reached. If they can arrive at a settlement, rather than having one imposed, both parties benefit.
- In handling grievances, stewards win or lose cases based on how carefully they have investigated the problem. This investigation may involve conducting interviews, determining pertinent dates, and getting names of witnesses. Stewards must ask questions for clarification, examine records, distinguish between fact and opinion, and decide what is relevant to the complaint. They also have to assure themselves that the grievance is legitimate.
- When a steward receives a case, he or she should determine whether a basis for the grievance exists. They should investigate to see if:
  - The contract has been violated.
  - The law has been violated.
  - Government-wide rules and regulations have been violated.
  - Agency regulations have been violated.
  - Past practices have been changed.
  - Employees are being treated unfairly.
- Just as stewards determine whether bargaining unit employees have legitimate grievances, supervisors should analyze any grievance received to determine whether there has been a violation of contract, law, regulation, past practice, or unfair employee treatment. If an employee files a grievance, contact your Labor Relations Specialist for assistance.

XII. Unfair Labor Practice (ULP)

A. Definition

- An alleged violation of a right protected by the Federal Service Labor-Management Relations Statute (5 U.S.C. Chapter 71)
- A ULP can be filed by an employee, the union or management.

B. Agency ULP Charges

- Section 7116(a)(1)
  - "Management shall not interfere with, restrain or coerce any employee in the exercise of its rights under the Statute."
    - Threatening employees with reprisal
    - Interrogating unit employees on union activity
- Section 7116(a)(2)
  - "Management shall not encourage or discourage membership in a labor organization by discrimination in connection with hiring, tenure, promotion or other conditions of employment."
    - Failure to promote because of union activities
    - Discipline in retaliation for activity as a union representative
- Section 7116(a)(3)
  - "Management shall not sponsor, control, or otherwise assist a labor organization...."
    - Campaigning for a specific individual
    - Help union organize membership drive
- Section 7116(a)(4)
  - "Management cannot discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or given any information or testimony...."
    - Transfer employee to undesirable job because he/she filed a ULP
- Section 7116(a)(5)
  - "Agency management shall not refuse to consult or negotiate in good faith with a labor organization...."
    - Implement change in condition of employment without notifying union
    - Bypass union (directly notify employees of a change without union present)
    - Unilaterally change established past practice, absent a clear and unmistakable waiver of bargaining rights
    - Refusal to bargain
- Section 7116(a)(6)
  - "Failing or refusing to cooperate in impasse procedure and impasse decisions...."
    - Refuse to provide the union official time for attendance at Impasse Panel hearing

- Section 7116(a)(7)
  - "An agency cannot enforce any rule or regulation (other than a rule or regulation implementing Section 2302 of Title V) which is in conflict with any applicable collective agreement if the agreement was in effect before the date the rule or regulation was prescribed."
- Section 7116(a)(8)
  - "To otherwise fail or refuse to comply with any provision of the Statute...."
    - Formal discussion
    - Weingarten meeting
    - Duty to supply information

C. Union ULP Charges

- Section 7116(b)(1)
  - "A labor organization shall not interfere with, restrain or coerce any employee in the exercise by the employee of any right under this chapter."
    - Expelling a member from the union for filing ULP against union.
    - Suggesting to employees that they must become dues paying members in order to receive union representation.
- Section 7116(b)(2)
  - "A labor organization shall not cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter."
    - Encourage agency to discipline employee due to anti-union activities.
- Section 7116(b)(3)
  - "A labor organization shall not coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee"
    - Fining union members for violating an internal union policy concerning acceptance of overtime work as an agency employee.
- Section 7116(b)(4)
  - "A labor organization shall not discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition."
    - Refuse to represent an employee due to race, color, creed....
- Section 7116(b)(5)
  - "A labor organization shall not refuse to consult or negotiate in good faith with a an agency...."
    - Failure to send representatives to negotiating table who have the authority to commit union.

- Section 7116(b)(6)
  - "Failing or refusing to cooperate in impasse procedure and impasse decisions...."
    - Refuse to meet with mediator on issues at impasse.
- Section 7116(b)(7)
  - "(A) To call, or participate in a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or
  - (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or
- Section 7116(b)(8)
  - "To otherwise fail or refuse to comply with any provision of the Statute...."Use of official time for internal union business.

D. Questions and Answers

- **Q:** What is the relationship between grievances and ULPs?
  - **A:** There is a very close relationship because both actions stem from disagreements, which arise from the three-way relationship that exists among employees, the union, and management.
- **Q:** Is there a difference between grievances and ULPs?
  - **A:** Yes, the differences relate mainly to the nature of the disagreement between the parties and the resolution procedure used to resolve the disagreement. Grievances relate to disagreements over the interpretation and application of a collective bargaining agreement between union or management or agency personnel regulations and are decided by an arbitrator. ULPs related to disagreements over coverage and meaning of the labor law and are decided by the FLRA.
- **Q:** Can a violation of a collective bargaining agreement ever be a ULP?
  - **A:** Yes, it can, but only under the most extraordinary of circumstances. One of the parties to the agreement must knowingly, deliberately, and willfully violate the agreement. For example, a ULP occurred in a case where one of the parties to the labor agreement announced that the agreement was no longer in effect (even though it was) and that grievances would not be processed. However, given the federal law's broad definition of a grievance, a ULP can be filed as a grievance, if the employee or union chooses.
- **Q:** When may a ULP be filed?
  - **A:** A ULP may be filed anytime within 6 months of the date the injured party became aware of the violation of the labor law.
- **Q:** Who determines if a ULP has been committed and how is this done?
  - **A:** The FLRA decides ULPs and its process for determining if a ULP has been committed is divided into two phases.
    - The first is the charge phase. During this phase, a representative of one of the regional offices of the general counsel of the FLRA independently investigates the matter to see if there are sufficient grounds to issue a complaint.

- If sufficient evidence does not exist then the FLRA regional office will dismiss the charges and drop the matter. The regional director's decision to drop the matter is subject to review by the FLRA general counsel. Decisions of the regional directors, however, are upheld in the overwhelming majority of cases.
- If the regional office finds that sufficient evidence does exist to require a complete investigation, a formal complaint is issued and a hearing is scheduled. The purpose of the hearing is to develop facts sufficient for the FLRA to determine whether an unfair labor practice has, indeed, been committed.

- **Q:** What happens if the agency is found guilty of committing a ULP?
  - **A:** The FLRA may prescribe whatever remedy is necessary to correct the ULP. This may include revoking the management action that caused the ULP in the first place, and requiring management to go back to the situation, as it existed before the ULP. Generally, however, the remedy consists of requiring the guilty party to sign and post a notice to employees which indicates that it will stop committing the ULP and that it will not take such actions in the future.

E. Free Speech!!!

- **Q:** The union is forever criticizing me but I'm never allowed to respond, because my response would be a ULP, right?
  - **A:** This is not quite true. As a legal matter. 5 U.S.C., Chapter 71, does allow freedom of expression for supervisors. Such expression, however, must not threaten to interfere with employee rights regarding union activity, membership, or representation; for example, any statement you make that may have a "chilling" effect upon an employee in the exercise of his or her rights may be a ULP. However, agency management may, in some instances, "correct the record" if erroneous or misleading union comments are made. In this regard, whether or not a manager's statement is a ULP often depends in the particular circumstances surrounding the incident. The best advice we can give is to call the your Labor Relations Specialist for advice before you say anything! This may be hard to do in the heat an argument but…

XIII. Labor-Management Cooperation

Executive Order 12871 as amended by Executive Orders 12974, 12983, 13062, 13138 and 13203

- Involvement of employees and their union representatives is essential to achieving the National Performance Review's Government Reform objectives;

- Employees and their union representatives are "full partners" with management in identifying problems and crafting solutions to better serve the agency's customers and mission;
- Management may negotiate over "permissive" subjects set forth in 5 U.S.C. 7106(b)(1) (see page 14).
- In addition to negotiations using traditional methods, the parties have the option of resolving matters through partnership or team processes, which normally involve the use of an interest-based negotiation process.
- Although E.O. 13203 rescinded E.O. 12871, the government still encourages labor-management cooperation whenever possible.
- Beginning in the next section, one may review examples and techniques for labor-management cooperation through partnerships or teams with a sample agreement, Interest-Based Problem Solving Process, and a comparison between Interest-Based and Traditional Negotiations.

INTRODUCTION TO LABOR-MANAGEMENT COOPERATION

The Partnership or Team Concept

In response to never ending call to provide a more efficient and responsive government, relationships between labor and management are changing. Across the Federal Government, labor and management are forming partnerships. By acknowledging their mutual interests and objectives, many former adversaries now work together as a united team with a common purpose and vision.

In prior years, traditional negotiation techniques were used to reach collective bargaining agreements and resolve workplace disputes. Union and management entered into talks with established, firmly held positions on issues, submitted inflated proposals, and argued vigorously. The parties exaggerated the importance of each proposal and demanded significant concessions by the other part in exchange for dropping inflated or unimportant proposals. Discussions focused on personalities and anecdotal data rather than issues. The net result of these tactics was a labor-management relationship built on acrimony, distrust, confrontation, and, worst of all, giving up control of the results of their negotiated agreement through grievance procedures or unfair labor practice (ULP) charges using the same behaviors learned while bargaining. A third party, such as an Arbitrator or the FLRA, would decide for you with a possibility of further damage to the labor-management relationship!

Many employees of the Federal Government and its unions have recognized the value of partnership or labor-management teams.

The concept of labor-management partnerships or teams is this:

> *Only by changing the nature of Federal labor-management relations so that managers, employees, and employees' elected union representatives serve as partners will it be possible to design and implement comprehensive changes necessary to reform government. Labor-management partnerships or teams will help Federal Government agencies to transform into organizations capable of delivering the highest quality services at the lowest cost to the American people.*

Note: On February 17, 2001, by Executive Order 13203, the President revoked Executive Order 12871 effectively dissolving the National Partnership Council and revoked all executive orders that amended Executive Order 12871. Executive Order 13203 abolished the requirement that previously imposed on agencies the formation of labor-management partnerships and councils, as well as the mandate to bargain on matters covered by 5 USC Section 7106(b)(1), the numbers, types and grades of employees or positions assigned to any subdivision, work project or tour of duty, or on the technology, methods and means of performing work. Consequently, the Office of Personnel Management withdrew its Guidance to agencies for Implementing Labor-Management Partnerships.

Executive Order 13203 does not prescribe any particular approach to labor-management relations. Agencies have discretion under the Federal Service Labor-Management Relations Statute (5 USC Chapter 71) to adopt a labor relations strategy best suited to their own needs.

A few principles of labor-management partnerships or teams in the Federal Government are:

1. The Federal workforce is valued as a full partner in substantive as well as procedural decision-making. This means that unions and agencies work together as partners to transform the way organizations are structured, work is performed, and services are delivered.

2. Problems are identified and resolved through consensual rather than adversarial methods.

3. Collective bargaining promotes the public interest. It promotes partners' ability to deliver high-value goods and services to the public and fosters Federal organizations' shared values through innovative approaches.

4. Dispute resolution processes should be fair, simple, determinative, fast, and inexpensive.

5. Union effectiveness is one of the cornerstones of the productive workplace partnership.

Does Partnership/Labor-Management Team Replace the Contract?

A partnership or labor-management team agreement should not replace the Labor / Management Agreement (contract), rather it should complement it. The Council strongly encourages labor and management to continue to bargain in good faith, as required by law. A successful partnership will increase efficiency by speeding up the traditional labor / management processes, with the contract always there as the firm foundation of a good relationship.

Make the Partnership or Team Work…

Time, patience, and trust are essential to making a partnership work. Here is an example of a specific approach useful in achieving a successful partnership.

Consensus Decision Making

Teams arrive at the most acceptable solutions to problems by including the input and support of the entire group through consensus decision-making. This method leads to an improved level of quality in and acceptability of the decision.

Consensus is reached when all members agree upon a single alternative, and each group member can honestly say:

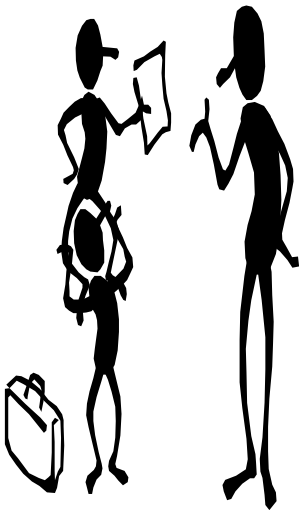
> *"I believe that you understand my point of view and that I understand yours. Whether or not I prefer this decision, I support it because it was reached openly and fairly, and it is the best solution for us at this time."*

Though the consensus solution may not be everyone's first choice, it is acceptable and understandable to everyone.

TIPS FOR REACHING CONSENSUS

- **Listen and encourage participation -pay attention to others**
- **Share information**
- **Don't agree too quickly**
- **Don't bargain, trade support, or vote**
- **Create solutions that can be supported**
- **Avoid arguing blindly for your own views**
- **Seek a win -win solution**
- **Treat differences as strengths**

Remember: At one time, Labor Management Partnerships were mandated by E.O. 12871. E.O. 12871 was rescinded by E.O. 13203 in 2001. However, the labor-management partnership or team process is encouraged as a <u>better way to do business</u>.



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Sample Labor-Management Team Agreement

LABOR/MANAGEMENT TEAM (LMT) AGREEMENT
(sample)
Work Unit / Labor Organization Chapter:
_____

State National Guard and the Name of Labor Organization

PREAMBLE

Recognizing that involvement of management, employees and their labor representatives is essential to accomplishing the mission of the State National Guard, Management and the labor Organization establish this labor management team to promote positive labor / management relations at the local level.

PURPOSE

The purpose of the labor / management team (LMT) is to foster within the State National Guard a cooperative, constructive working relationship among employees, their representatives, managers and supervisors. To this end, all team members will work towards establishing an atmosphere of mutual respect, trust, and development of mutually acceptable means to accomplish the State National Guard's mission to provide quality, timely service within reasonable cost to its external and internal customers.

OBJECTIVES

1. To foster the participation of employees in the decision-making process.

2. To promote mutual respect, active listening, and the use of consensus in reaching decisions, and share information in an open, candid manner.

3. To ensure that all employees understand the vision, mission, and goals of the partnership.

4. To create an environment which prevents problems as well as fosters problem solving.

5. To ensure implementation of the partnership throughout the State National Guard.

6. To find solutions that incorporates Good Government Standards. These standards are to increase quality and productivity; and to promote customer service, mission accomplishment, efficiency, quality of work life, employee involvement and organizational performance, while considering the legitimate interests of the parties.

STRUCTURE

A. Labor/Management Team (LMT)

1. There will be a state team council made up of equal representation from management and the labor organization. There should be no more than ____ management representatives selected by the head of the State Guard and no more than ____ labor representatives selected by the Union. The parties may add a non-voting person as recorder. Once LMT members are nominated, names will be submitted to the HRO for approval.

2. The LMT should meet at least quarterly on dates and times to be determined by the LMT. Agenda items shall be submitted by the parties two weeks prior to meetings. Ad Hoc meetings can be called with mutual consent of the parties to cover issues that involve disputes, customer service, cost reduction and efficiency.

RESPONSIBILITIES

A. The Labor / Management Team (LMT) will:

1. Fully address policies, practices, and working conditions within the work unit.

2. Review and act upon proposals for demonstration and pilot projects.

3. Disseminate and share information and make appropriate recommendations.

4. Submit all recommendations to the TAG / HRO for consideration and approval

AUTHORITY AND FUNDING

The Adjutant General in concert with the local units will provide authority and ensure funding to support the LMT. The final authority for substantive changes will rest with TAG and HRO.

PROCESS FOR CONSENSUS

The members of the LMT will determine the methods and means of arriving at a consensus. A facilitator such as the labor relations specialist from HRO, may be used when necessary.

TRAINING

The LMT will assist in the training and education for managers and supervisors and labor representatives to accomplish team goals and objectives.

COMMUNICATION

The LMT will encourage open and participatory communication.

1. Agenda Development – A designee will develop an agenda with input from team members two weeks prior to the scheduled, and distribute it five working days in advance of the meeting.

2. Minutes – Will accurately reflect the decisions, actions and intent of the team. A file copy will have attached documentation. Minutes will go to ONLY team members for review before becoming record. Minutes of record will be distributed to the LMT. Action items will be conveyed to appropriate organizations by appropriate labor or management officials.

3. Newsletter – A "LMT Newsletter" may include information, action items, and accomplishments.

4. Records – Records of the LMT (agendas, minutes, supporting documentation, surveys, etc.) will be maintained centrally by the recorder.

5. Resources – The LMT will seek information from non-members in order to clarify or resolve action items/issues. Input to the team from non-team members will be encouraged, and mechanisms to facilitate this information will be developed by the LMT.

6. Ground Rules – The ground rules will be established by the LMT.

STATUTORY RIGHTS

Both parties agree that they will retain their statutory rights under this partnership agreement. It is further agreed that in the best interest of management and the labor organization that this team is a process that can supplement and compliment rather than replace the negotiated agreement. It is further understood that if consensus is not obtained through the process, the parties agree to disagree and move on to other methods of problem solving.

Since successful teams depend on the uninhibited and free exchange of discussion, it is agreed that neither party will introduce conversations or written documents into legal or quasi-legal forums; e.g., FLRA hearing, arbitration, contract negotiations or a court of law.

EVALUATION

The LMT will evaluate its partnership progress on an on-going basis. Yearly, the LMT will review the team accomplishments, process, objectives, purpose, mission effectiveness, and impact; (i.e., grievances, ULP's, adverse actions), using procedures developed by the team. They will then determine whether to renew the process and/or make changes in any aspect of the LMT. The Adjutant General may select an outside auditor to determine progress or lack of progress of the LMT.

DURATION

Management and the labor organization are "willing" participants in this team. If the goal of better service to the National Guard's customers is not met, either party may terminate this agreement in writing within thirty (30) days.

FOR MANAGEMENT **FOR LABOR**

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Date: _____

CONDUCTING NEGOTIATIONS FROM A COLLEGIATE PERSPECTIVE

Negotiating Part 1 – Competitive or Adversarial Negotiations

(Positional)

Many of the excerpts here are from Dr. Allen, of Texas A&M University, Labor Relations Course and the Fisher and Ury Book "Getting to Yes"

Before examining competitive negotiations, it may be useful to examine in some detail the basic components of the relationship that emerges between the parties to a dispute when they seek to resole it through negotiations. By understanding the characteristics of the relationship, you are likely to gain some insights into the choices made by negotiators to behave cooperatively or competitively. Rubin and Brown, in their excellent book entitled *The Social Psychology of Bargaining and Negotiation*, describe the bargaining relationship in terms of five elements.

There are at least two parties involved. The two parties could be individuals (e.g., . customer and salesperson when trying to determine the selling price of a product) or they could be more complex social institutions as found in union/management relationship or in peace talks like those currently involving NATO countries, Russia and Serbia.

The parties have a conflict of interest with respect to one or more different issues. The are two major categories of conflict: single issue and multiple issue cases. In single issue conflict, there is only one issue at dispute. With respect to that single issue, the parties can be expected to have different preferences. For example, when you go out to buy a new car, your best deal might be characterized by a high trade in on your old car and a low price on the new car. A profitable deal for the sales person might cause your monthly payments to be higher by decreasing the value of your trade-in and maximizing the cost of the new vehicle. This situation represents a classic bargaining situation that can be described as a zero sum game, i.e., whatever one party gets in terms of a better deal is realized at the direct expense of the other party. In this example, the subject of bargaining is the "final value" of the deal and the conflict of interest concerns where the final agreement will be struck. While such situations do not have to be viewed as a zero-sum game, they are commonly approached that way.

In the multiple issue situation, the parties disagree on more than one issue. These situations tend to be more complex because the conflict of interest may involve the preferences for the different possible agreements on a particular issue as in the single-issue case. For example, in a collective bargaining situation, unions and management may have a conflict of interest over the increase in wages to be granted.

Such disagreements may also arise concerning other issues the labor and management's bargaining agenda. The bargaining situation becomes more challenging as the number of issues at dispute increase. In addition to this conflict, there may also be conflict expressed in terms of a difference of opinion concerning the order of assigned to the issues by the parties involved. This has implications for the order in which items are negotiated. For example, management representatives may believe that the negotiation of a strengthened management rights clause is a top priority item whereas the union thinks its unimportant. On the other hand, the union believes that negotiations over a wage increase is the most important issue, and as a result, wants to deal with that issue before any others are addressed. Because of these different preferences, the parties may come into conflict over the priorities assigned to the various issues needing to be resolved.

Regardless of the existence of prior experience or acquaintance with one another, the parties are at least temporarily joined together in a special kind of voluntary relationship. VOLUNTARY is the key word in this statement. At the outset of negotiations the parties to the dispute must believe that they would be better off if the conflict was resolved. It is this belief that encourages the parties to voluntarily enter into the bargaining relationship. They are free to enter the relationship. Similarly, they are free to leave it if it is subsequently determined that a mutually acceptable resolution of the disagreement cannot be reached.

In other words, for bargaining to exist, the parties must believe they are participating by choice, not by compulsion. Given this perspective, the bargainers are faced with two important and related choices. At one level, each bargainer must choose whether they should enter into and then remain in the bargaining relationship. In making this decision, each bargainer must determine whether he expects to gain more by bargaining than by not. In order for bargaining to take place, each party to the dispute must believe that they will be better off or at least no worse off relative to the situation they would be in if no agreement was reached. At a second level, each party must be able to choose from one or more possible outcomes that could resolve the dispute. Out of the list of potential solutions for the disagreement, at least one has to be better than the party's no-agreement situation. If none of the possible outcomes are better than the no-agreement alternative (in unit 5 this is referred to as a BATNA), then the parties must be able to reject the alternatives. If none of the options provide them with losses greater than the gain that can be realized by a negotiated solution, then the parties must be able to stop bargaining.

This view of the voluntary nature of the bargaining relationship can be described by stating that the parties have mixed motives toward each another. On the one hand they believe that they would be better off as a result of a negotiated solution. This suggests that they must be willing to cooperate with the other side, at least to the extent needed to reach an agreement. When they enter the bargaining relationship, the parties must believe that an agreement is possible and that they have more to gain than to loose by working with the other side to resolve the conflict. If the interests of the parties were the same, there would be little to bargain about. Conflict is more likely to be the result of a clash of interests than a mutual sharing of interests. At the same time, if the parties' interests were totally opposed to each other's interests, then it would be difficult to cooperate to the extent needed to reach an agreement. This suggests that there is a range of conflict situations that have the potential for bargained solutions. When there is too little conflict, negotiated outcomes are not needed. The parties can usually live with the status quo. When the conflict is extreme, bargained solutions are not feasible. Think about a conflict that involves a fundamental disagreement over bedrock human concerns, e.g., the abortion issue. Because of the profound and intractable differences between the parties on fundamental issues such as when life begins and whether life can be taken to protect another person's life, a negotiated solution to the abortion debate is unlikely.

Bargainers are concerned with either (a) the division or exchange of one or more specific resources and/or (b) the resolution of one or more issues or problems about which the parties disagree. Each party wants an outcome that will improve or at least not harm its status quo situation. One of the basic characteristics of a bargaining relationship is that the outcomes received by one party must be somehow related to the outcomes received by the other party to the dispute. This is known as outcome dependence. The quality of the outcomes you receive from bargaining is dependent upon the other bargainer's outcomes. In a union/management situation the wages increase negotiated by the union must have an effect on the revenues of the firm. Similarly, a broadened management rights clause has to give management greater freedom to conduct business, and at the same time, somehow restrain the rights of the union's members. The needs and interests of the union and employer are correspondent to some degree. Both sides want the company to be financially success. If it fails, owners and managers lose as do the employees who lose their jobs. At the same time interests are at least partially non-correspondent. The Union is probably looking for a wage increase larger than the employer is voluntarily willing to grant.

Similarly, management will probably want to expand its right, thereby limiting the discretion of the union, more than the union is voluntarily willing to accept. Rubin and Brown point out that where the parties' outcomes are completely correspondent as would be the case where whatever benefited party A also benefited party B, bargaining would probably not be necessary. There is simply no need for the parties to enter into a bargaining relationship. There is no conflict to be resolved. On the other hand, where bargaining outcomes are completely non-correspondent as would be the case when a gain for party A was achieved as a result of imposing a loss on party B, bargaining would be difficult.

This interdependence of outcomes leads to a a problem known as the "dilemma of goals." Each party would like to negotiate a settlement that is more favorable than their status quo alternative. However, as they move to such an agreement, the parties expose themselves to two risks. If they drive too hard for an outcome that maximizes their gain, the other party may be left with an outcome so unsatisfactory that they refuse to agree or even leave the relationship. However, if they do not drive hard enough for an acceptable settlement, their needs and interests may not be met while the other party receives a very good outcome. To resolve this dilemma, each bargainer must establish what is believed to be an acceptable settlement. This can be defined as one that is acceptable (i.e., better than the no-agreement alternative) while at the same time having a good chance of being accepted by the other bargainer. The challenge is to obtain the best agreement possible given the other bargainer's likely resistance.

Bargaining activity usually involves the presentation of demands or proposals by one party, evaluation by the other, followed by concessions and counter proposals. These activities are sequential rather than simultaneous in nature. To secure a bargained solution to a dispute, the parties need information about the others preferences for alternative solutions. However, only the other party to the dispute can provide much of this necessary information. This means that not only are the parties' outcomes interdependent (the previous point), their information needs are also interdependent, i.e., they are dependent of each other for the information needed to reach a negotiated solution. This is known as "information dependence."

The exchange of proposals and counterproposals provides the bargainers with information about each other's preferences. Given the sequential nature of the exchange of proposals, the party receiving a proposal has an advantage (at least temporarily) by having more information about preferences than the party making the proposal.

With this information the party receiving the proposal should be able to craft a more precise bargaining position than would be possible than if the information was unavailable.

The often complex and tortured way in which information is exchanged is explained to some degree by the need for information exchange to take place (you can't have bargaining without it) and restraints against providing the other bargainer all of the information it needs. These incentives and obstacles for the exchange of information lead to two dilemmas that the parties must resolve to negotiate effectively. First, there is the "dilemma of trust." By satisfying the information needs of the other bargainer, you risk being exploited by the other side who can use that information to your disadvantage. In other words, by sharing information with the other side you might not be able to realize your bargaining objectives. You have to decide how much information to share with the other side. You also must decide how much of the information provided by the other should be believed. If you believe everything the other side has to say, you may not be able to satisfy your needs and interests. However, if you don't believe anything the other party has to say, then there is no basis for a relationship through which the conflict can possible be resolved. Rubin and Brown point out that at some point in the relationship, each party must confront this critical problem. They have to draw some conclusions, based on the behaviors they have observed, about other bargainer's true intentions, interests and preferences. Based on these conclusions, a decision can be made concerning how much information you are willing to share with the other side and how much of the information they provide you that you are willing to believe.

The second dilemma caused by being dependent on each other for information is known as the “dilemma of honesty and openness.” Information must be exchanged for bargaining to take place. The issue concerns how honest or deceitful you will be when you provide information to the other side. If you are completely honest, there is a risk that the other side will use the information to your disadvantage. Alternatively, by being honest, you may commit your self to a position from which it is difficult to move later in negotiations. Clearly, there are advantages associated with withholding or concealing information until a time that is most advantageous to your position. Withholding information creates the opportunity to be flexible later in negotiations. Doing so also allows you to put off the decision to be honest or deceitful to a later point in the negotiations. Rubin and Brown point out that to sustain a bargaining relationship, each party must select a middle course between the extremes of complete openness and honesty and attempts to totally deceive the other bargainer.

ADVERSARIAL OR DISTRIBUTIVE NEGOTIATIONS

Adversarial or distributive bargaining is based on a specific configuration of the characteristics of the bargaining relationship as described by Rubin and Brown. Rubin ("Negotiation," American Behavioral Scientist) talks about how the characteristics of the bargaining relationship force negotiators to walk a tightrope. The dilemmas created by the interdependency of the parties discussed in the preceding section push them towards the extremes of cooperation and competition. Rubin specifically discusses three tightropes:

1. While it may be tempting to press for an outcome that is most favorable to your position, by doing so you risk forcing a solution on the other bargainer that is worse than their no-agreement position. As a result, they can be driven from the bargaining table thereby precluding the problem form being resolved. Alternatively, you might be so tempted to cooperate with the other side to assure a good relationship that you settle for a poorer outcome that you could have obtained if you had been less cooperative.

2. The second tightrope involves the decisions to be open and honest or to rely on misrepresentations as part of your bargaining strategy. If you are totally open and honest, you risk being exploited by the other side. However, if you completely withhold information from the other side, they may mistrust you or even refuse to bargain with you.

3. Negotiators must walk another tightrope defined in terms of short-term and long-term gain. While it may be possible to negotiate an outcome that is very beneficial to your side (at the expense of the other side) in the short run, you risk destroying the relationship and any possibility for securing mutual gain over the long run. This is because of the continuity of the relationship that has already been discussed. For example, a short-run decision to lie to the other side could elicit feelings of mistrust that decrease the likelihood that bargained solutions can be reached in the future.

Distributive bargainers have the following characteristics:

1. Seek to maximize their own returns from the conflict resolution process in the "here and now" with relatively little concern for the longer run consequences of their behavior. In other words, they have decided to emphasize their short run gains without much regard for the long run relationship with the other side.

2. Frequently consider the need and interests of the other bargainer as being illegitimate, and therefore, tend not to give much attention to such issues while negotiating. The focus for the distributive bargainer is to gain as much as they can from the negotiations without concern for the other bargainers needs and interests and for whether the negotiated solution benefits the other bargainer as well.

3. Have flexible standards with respect to the tactics that they will employ to get the negotiated solution that they want. In other words, they may be willing to do whatever it takes to get what they want, including the use of tactics that might be considered immoral or unethical in other circumstances. If withholding information, distorting information or lying is necessary to secure their preferred outcomes, the distributive bargainer is willing to use such tactics.

4. Will behave cooperatively only to the extent that it advances their position or otherwise advances their self interests.

5. Focusing on winning the negotiations, i.e., getting the best outcome for them with little concern for resolving the problems that led to the conflict.

6. Strongly defend themselves from the bargaining tactics employed by the other side.

7. Tries to control the bargaining process.

Distributive or adversarial bargainers want to get the best deal for themselves with little concern for the concerns of the other side. Distributive bargainers are likely to believe that the interests of the other side are not legitimate, that the other bargainers probably cannot be trusted, and that it is very risky to be open and honest when dealing with the other bargainers. It can also be assumed that it is quite likely that the other bargainer holds a similar set of beliefs. It is also commonly assumed that resources are fixed (i.e., a zero-sum game).

As a result, a gain realized by one party comes at the expense of the other. The strategy and tactics of distributive bargaining have developed in response to this these assumptions about the nature of the conflict and the character of the bargainers.

The objectives of distributive bargaining. Clearly, the objective of adversarial negotiations is to get the best deal for you. For example, if you are buying a house, you want the lowest price possible while the seller is trying to get the highest possible price for the dwelling. In unit 4, this process will be described as claiming value. Distributive bargaining is most likely to be observed when there is a conflict between two or more parties over the allocation of resources perceived to be scarce. For example, in labor/management relations, the parties commonly engage in distributive bargaining when trying to settle disputes over issues such as wages and other economic terms and conditions of employment. The term distributive bargaining comes from the perspective that there is a certain amount of value (e.g., the revenues of the company) that is fixed and can be allocated between the parties. The revenues of the firm could go to the owners of the firm as profits or to the workers as pay raises. Whatever money is distributed as profits is unavailable to distribute the workers as pay raises and vice versa. In the union/management example, the objective is use the bargaining process to distribute the revenues in a way that is most favorable to your side while the other bargainer is pursuing the same objective. While the amount of revenue is fixed, the share that can be received by each side is variable. The strategy and tactics of distributive bargaining are designed to get your side the biggest share possible. Because of this objective, there is a fundamental conflict of interest between the parties to the dispute (i.e., how the revenues are going to be divided).

Preparation for negotiations. The best way to talk about the strategy and tactics of distributive bargaining is to review examples that focuses on the parties preparation for this approach to bargaining. Properly preparing in advance of negotiations and developing you communication and problem skills is the foundation of successful negotiations.

Negotiating Part 2 – Collaborative or Win-Win Negotiations

One of the basic skills needed by managers today is the ability to negotiate effectively. In the old days, disputes among managers or between managers and subordinates could be resolved by appeals to someone higher in the organizational hierarchy. This is less likely to be the case today. Many organizations are decentralizing decision making in an attempt to become more responsive to the rapidly changing demands placed on them by their environments. At the same time, a growing number of organizations are trying to get workers more involved in decision making as part of efforts to enrich working environments and to enhance organizational performance. While such changes represent important reactions to growing competition, and changing societal values, the result is a looser organizational structure. Consequently, rules and regulations that facilitated decision making in the past, cannot survive the rapidly changing pressures for organizational change. Therefore, they are supplanted by guidelines. Job descriptions are written in vaguer terms. Levels of management are eliminated or their roles drastically revised in attempt to streamline the operations and cut costs. The result of such change is greater conflict among members of the organization at the same time the traditional approaches to conflict resolution appeals to higher level management are becoming less available and less effective.

Many of us are likely to cringe at the prospect of conflict becoming greater in our organizational homes. However, increasing conflict is not necessarily detrimental to you or the organization. In the old days, organizational theorists viewed conflict as a failure to manage effectively. It was ignored, or resolved by appeals to higher management which would impose solutions upon the parties to the conflict. Today, conflict is viewed in a different light. The contemporary view of conflict is that it is an inevitable and necessary part of organizational life. Some conflict is beneficial because it helps identify problems, that if resolved in an effective and constructive manner, will lead to a better organization. For example, a disagreement between two departments can lead to the development of new solutions to old problems. As a result, the conflict serves as a stimulus for organizational innovation and change. With this perspective, the task of the manager is not to ignore the conflict or to resolve it for his or her subordinates but to oversee its resolution through the application of effective bargaining practices.

It must be emphasized that conflict handled effectively can be a positive force in the organization. It increases the awareness of the parties to the disagreement to the problem, it motivates those involved to address the issues, and if handled constructively, conflict can enhance morale and cohesion. Members of the organization see that their relationships are strong enough to withstand the stress created by the problem and are impressed by their ability to handle the challenges facing them.

The idea that conflict is a necessary and inevitable part of organizational life that does not have to be a destructive force is based on the premise that the conflict can be handled in a constructive fashion. In our society whenever there is little reason to believe that this is likely to be the case. Historically we tended to take an adversarial approach to negotiations. we assume that any negotiations over the resolution of the conflict will be a win/loss process. As a result, it is necessary to behave competitively in order to get what we want from the discussions. Based on this perspective, negotiations usually take a rather tortured course. We state our positions in terms of demands. We limit the information that we share with the other side to that which supports our position. We are unlikely to make concessions. Remember, we think we are in a win/loss situation. As a result, whatever the other side gets represents a loss to us. We rely on threats and underscore our willingness to walk away from the negotiations if we don't get what we want. We might threaten to hurt the other side. Don't be surprised if I get all emotional and start calling you names. Because I am afraid that I am going to lose something of value, I am motivated to withhold information, distort information, and mislead you about what I really need from the negotiations. My guess is that you are behaving in a similar manner. We can never forget the fact that negotiations involve human beings. This is easy to forget because we assume that we are dealing with some abstract other bargainer and not a human being somewhat like ourselves. We can never forget that the other bargainer has emotions, deeply held values, backgrounds and viewpoints, and can be unpredictable – just like us.

Bargaining of this nature has its applications but not when resolving organizational conflict. This approach to bargaining has a tendency to leads to winners and losers. The more powerful party tends to win and the weaker party is likely to lose, regardless of the relative merits of the dispute. This can mean that the best solution to the dispute might not be found. Consequently, the organization is diminished to some degree. There was a better solution to the problem available to the parties but because of their approach to negotiations they were unable to find it. As a result, a less than optimal solution was reached. In bargaining parlance, it is said that the parties leave something of value to the bargaining table.

While a good solution was available to them, they opted for a solution that was good for one side and bad for the other. In adversarial bargaining, the best you can usually hope for is an outcome that is mediocre. While this is better than a bad solution, it is not as good as a good solution to the problem.

I'll argue that the negative consequences associated with adversarial approaches to bargaining go beyond the inability to develop good bargaining outcomes. I'll argue that future relationships between the negotiators are also likely to suffer. How do you feel after you just got tromped at the bargaining table. Are you likely to view it as a growth experience? Will you praise the other bargainer's expertise? Will you simply write it off to experience? Will you forgive and forget? NO!! You start plotting your revenge. You will sit back and wait for an opportunity to get even. And then when the opportunity arises, you will exact your revenge. You'll get even and then some. This is a natural reaction to getting whipped at the bargaining table but it is a reaction that can tear at the fabric of organizational life. Unlike other bargaining arenas, negotiations take place between individuals who must live together after the negotiations are over. You should not forget that you have a continuing relationship with the other side that if damaged as a result of the bargaining process the other bargainer and the organization can be hurt. It is important that whatever approach to negotiations that is adopted be considerate of the interest of the people involved and the need to preserve or even strengthen their relationship. Because adversarial negotiations can be so detrimental to the individuals involved and to the organization, it was necessary to revisit our traditional approach to negotiations and develop approaches more hospitable to the needs of organizations and their members today. Win/Win negotiations is a label that has been attached to an approach to bargaining that is more likely to yield wise solutions to problems while maintaining or bettering the relationships among the individuals party to the process.

I like to use an approach to bargaining called principled negotiations. You can read about it in the book, Getting to Yes, by Fisher and Ury. It takes a problem solving approach to negotiations that leads to good agreements that are reached efficiently and with amicable relationships between the parties. Principled negotiations has four fundamental elements to it.

First, it recognizes that the involvement of people in the bargaining process creates problems that can interfere with getting the results that you want. Most times, negotiations is characterized by a "people problem" because you see the other bargainer's needs, interests, personality and bargaining style as an obstacle to your bargaining success.

Principled negotiations encourages you to specifically deal with your concerns about the other side and the relationship that exists between you. This is especially important in bargaining that takes place within organizations because the parties to the negotiations have to live together after the conclusion of the negotiations.

We usually entangle our concerns about the other bargainer with our discussions of the substantive issues. For example, if we don't trust the other bargainer, a "people problem" we respond by trying to protect our position by withholding information, distorting information and otherwise misrepresenting our position in the negotiations. It is likely that the other side is doing the same thing. It will be difficult for negotiations to be successful and satisfying with this approach.

Principled negotiations requires that you separate the people from the problems. You need to deal with the people problems separately from the substantive issues. The key to this approach is to deal with the people problems directly and not try to bury them in the discussions over substantive issues.

For example, if you don't trust the other side, address that issue. You could work to develop a better relationship with the person so that trust can be developed. I cannot overemphasize the power of having a good relationship with the other side. If the parties know each other well and appreciate the advantages of having a good relationship, they will be able to talk effectively during the negotiations process. Also, substantive discussions may go more smoothly because one or both sides to the negotiations might be willing to make concessions or share information for the sake of the relationship.

Another approach is to discuss the lack of trust with the other side. Perhaps it exists because you don't know the other bargainers or understand their position. It might be possible to make separate arrangements to deal with the lack of trust issue. For example, if the Americans and Soviets don't trust each enough to believe that the other side will reduce the number of weapons they have in their stockpiles, they negotiate agreements that allow for on-site inspections.
With this type of side deal, trust issues do not have to be resolved but they also do not have to stand in the way of an agreement.

The second dimension of principled negotiations is the need to focus on interests and not positions. adversarial negotiations usually focus on positions. The union comes into negotiations and demands that the company provide one year notice before it introduces any new machines into the operations.

Management responds that it has a fundamental right to run the plant the way it wants including the right to introduce technological change. Both the union and management have expressed positions. Positions are the public stances taken by the parties concerning the outcome that they desire from the negotiations.

Since the problem appears to be a conflict of positions and since the goal of negotiations is to reach a decision concerning a position, it is natural to focus attention on positions. However, this typical approach frequently leads to frustrations. It is impossible to respond to the union's position with respect to technological change and give due consideration to the company's position on the management's rights issue.

However, an agreement might be more likely if the parties focused on interests. Interests are the wants, needs, desires, fears, and concerns that motivate people to behave the way they do. They are the silent movers behind the commotion represented by the positions expressed by the parties. Your position is a stance that you decide to take with the other party. Your interests are the reasons you decided to take the stance.

Why did the union want to restrict technological change? In other words what was its interest? The concern was probably job security. Certainly one way to provide greater job security is to restrict technological change but at the same time it sharply limits management's prerogatives, an interest very dear to management representatives.

What would have happened if the union went to management and said "In the face of the weakening economic conditions we have grave concerns about the security of our members' jobs. What can be done to enhance their job security during these tough times?" Would they have gotten the same negative response that they would have gotten when they tried to restrict technological change? Not likely. The likelihood is that they would have reached some kind of agreement.

For example, in the auto industry, the union has addressed the job security issue by negotiating employment levels and then allowing the companies to do what they want to do with respect to change as long as the employment levels are respected. This approach respects the workers need for job security while giving the company the flexibility it needs to run the plant.

They could have negotiated retraining and relocation of displaced workers, job sharing, early retirements, or a number of other approaches that would enhance workers job security without impinging on management rights.

This example shows why an emphasis on interests rather than positions works so well. For every interest, there are usually several possible positions that could respond to it. Going back to the union example, it might be possible for the parties to find a position that is responsive to the union's concern for job security without impinging upon management rights. This is harder to do when the focus of attention is exclusively on positions without understanding the interests that underlie these positions. It must be emphasized that when you look behind opposed positions for the motivating interests, you can often find an alternative position which meets your interests as well as the interest of the other side.

The most dominant interests involve basic human needs. In searing for basic interests behind a declared position look for those bedrock concerns that motivate all people such as security, economic well being, sense of belong, recognition, esteem, and control. If you can take care of such basic needs, you increase the likelihood of reaching an agreement.

How do you do this. **Preparation is the key.** Knowing what's driving you is critical. What do you want from the negotiations and why are these outcomes important to you? It is also important that you understand the other bargainer's interests. Studying the other side prior to bargaining is important. It is also important that you be able to talk about interests with the other side if principled bargaining is going to work.

The purpose of bargaining is to serve your interests. If you did not think you would be better off with a negotiated solution to a problem then why would you bargain. You wouldn't. The chance of having your interests served increases when you can communicate what those interests are.
If you want the other bargainer to take your interests into consideration, then you must be willing and able to explain what those interests are.

It is also important that you be able to help the other side express their interests. Use of questions about their needs is a useful approach. Putting yourself into their shoes and imaging what it is like to be there might provide you some useful insights.

Once interests are addressed and understood then the bargaining problem is to identify a position that is responsive to both sets of interest.

This takes us to the third dimension of principled negotiations. Fisher and Ury refer to it as the invention of mutual gain. This refers to the ability to invent solutions that are advantageous to both sides. Since both sides benefit from the negotiations, the term win/win negotiations is frequently applied to the process.

As I have studied the bargaining process, it has become more and more apparent that principled negotiations and problem solving are the same thing. The parties have a problem. In light of the interests that we have identified, is there a position that is acceptable to both sides. This is a problem that can be addressed by the application of problems solving techniques.

We can define the problem. We can apply problem solving techniques such as cause/effect modeling and force field analysis. Then we can generate a list of solutions that are responsive to the problem. This is where we can apply our creativity stimulating techniques such as brainstorming. We want to get as many potential solutions on the table as we can. Then we want to evaluate these alternatives to see which ones provide opportunities for mutual gain. At the same time we want to invent ways to make it easy for the other side to make the decision to agree with an option that we want.

This requires that you examine the options from the other sides perspective and imagine how they might criticize them. Then you need to think about how you can respond to that criticism. This kind of exercise will help you appreciate the restraints under which the other side is operating. Then you can generate responses that will address the concerns that the other side is likely to raise.

In a complex situation, creative inventing is an absolute necessity. In any negotiations, it can open doors and produce a range of potential agreements satisfactory to both sides. therefore, generate as many options as you can before selecting from among them. Invent first, decide later. Then make it easy for them to agree with your position.

The fourth dimension of principled negotiations, is the need to insist on objective criteria for determining the final deal.

In short, this means that you commit yourself to reaching a solution based on principle, not pressure. This also means that you concentrate on the merits of your case, and not the toughness of the parties. Be open to reason, but not to threats.

The more you bring standards of fairness, efficiency or scientific principle to bear on a problem, the more likely you are to produce a package that is wise and fair. For example, try to rely on standards such as precedent or community practice. By so doing, you are more likely to benefit from your past experience.

Positional bargaining leads to a battle of the wills. You talk about what you will accept and what you will not. Under such circumstances, it may be difficult to reconcile differences. It is difficult to be efficient and amicable if you are tied up in a battle of wills. You are likely to be in a situation where each side expects the other side to back down. Part of the problem is that it is difficult to determine what is an appropriate settlement.

The constant battle of the wills threatens the relationship. However, principled bargaining tends to preserve the relationship because it relies on the discussion of objective standards that can be used to resolve the problem instead o using threats of force to pressure the other side to submit.

Recognize the tremendous change in attitude and behavior that is required by positional bargaining. Rather than trying to get what you want for yourself without any concern for the other side, you decide to work for a solution to the dispute that is mutually satisfying. While this takes a different attitude and relies on different negotiating skills and abilities, we know that the old adversarial approach to negotiations will not yield the wise solutions to organizational problems reached in an amicable fashion that organizations need today.

Win/win negotiations take time and effort. Good deals are not always going to come your way. Take the initiative and try a different approach. With practice, win/win negotiations will become a way of life that can yield good solutions while at the same time building good relationships.

Handling Difficult Bargaining Situations

Fisher and Ury's approach, principled negotiations, has the potential to be effectively used in a wide variety of conflict situations. However, the authors' experience after the book was written indicated that it was not universally successful. The approach works best when all parties to the disagreement commit themselves to a collaborate effort to resolve the problem on terms that are acceptable to both parties because their interests have been reflected in the final outcome. Unfortunately, everybody does not share this perspective. If everyone read *Getting to Yes*, then principled negotiations would work more effectively. However, this is not the case.

There will be times when the other bargainer is unwilling or unable to adopt the principled negotiations approach. The other party may not be willing to search for mutually acceptable outcomes. They may not be open and honest with you. What if the other side withholds needed information, or, calls you a liar? They may threaten you or have temper tantrums. They may not be willing to talk about their interests or listen to you talk about your interests. They may be committed to "winning" at any cost. They just may say "no" to whatever you ask them to do. When these conditions are present, negotiations can be very difficult. You may be tempted to leave the negotiations on the assumptions that you will never get your interests addressed given the attitudes and behaviors of the other bargainer. You may get angry and frustrated, and in the process, think about abandoning principled negotiations for a more adversarial approach to conflict resolution.

While these alternatives may appear attractive, you need to be disciplined enough to realize that approaches are available to you that will allow you to reach a negotiated solution to the conflict while maintaining your commitment to a cooperative negotiating style. While the task is difficult, preserving that win/win attitude in the face of determined opposition form the other bargainer is possible. William Ury wrote the book *Getting Past No* as a sequel to *Getting to Yes*. In this book, Ury presents what he calls a breakthrough strategy that will allow you to overcome the tactics used by the difficult negotiator and reach a settlement on mutually acceptable terms.

Ury argues that the key to the breakthrough strategy is to understand why the other bargainer is being so difficult to deal with. Why will the other bargainer no be cooperative with you? By dealing with the other bargainers' underlying motivations you have a chance to move the negotiations forward. For example, the other bargainers could be angry and frustrated. In response to these emotions, they could be rigid and demanding. Why is this the case/ the other bargainers could be fearful and distrustful.

With this mind set, they may feel the need to defend themselves. It is also possible that the other bargainers engage in distributive bargaining tactics because they do not know any other way to negotiate. There are a lot of people who view life as a zero-sum game. Any position other than their preferred one is viewed as an unwanted compromise. They want to win. With this attitude, to be a winner, there must also be a loser. They may resist the exploration of outcomes that are considerate of the other bargainer's interests. For cooperative negotiations to be successful, the other bargainer must know how they will benefit from the collaborate effort. It is possible the other bargainer will resist cooperative negotiations because they do not see how they will benefit from doing so. Ury points out that to deal with such problems you must learn to deal with five issues:

1. The other bargainer's emotions
2. The other bargainer's negotiating habits
3. The other bargainer's skepticism that principled negotiations can work
4. The other bargainer's perception that he/she is more powerful, and therefore, does not have to negotiate cooperatively with you
5. You reactions to the difficult and frustrating behaviors exhibited by the other bargainer.

The Breakthrough Strategy – A Five Step Process

Ury presents a five-step approach for dealing with the challenges posed by difficult negotiators. He points out that the strategy is counterintuitive. At the time you are angry, frustrated and disappointed with the behavior of the other bargainer, the breakthrough strategy requires you to not do what may come naturally, i.e., respond in kind to the other bargainer's difficult behavior. When the other bargainer is disrespectful of your interests, you may want to assert them. When the other party tries to pressure you into doing something that you do not want to do, you might want to employ pressure tactics of your own.

If you react to the other party's tactics by becoming difficult yourself, you will be forced into distributive bargaining or you may have to end the negotiations because your interests will not be met.

Remember that you would not have entered negotiations if you did not believe that you would be better of by working with the other party to resolve the disagreement. You also initially believed that a collaborative, rather than confrontive approach would better serve your purposes. There are strong incentives for you to expend additional effort to salvage the difficult negotiations. Ury's breakthrough strategy, while challenging to employ, offers the possibility of reaching an interest-based outcome in the face despite the unwillingness of the other bargainer to work with you in a cooperative manner.

Ury describes his approach as follows:

> *The essence of the breakthrough strategy is indirect action. You try to go around his resistance. Rather than pounding in a new idea from the outside, you encourage him to reach for it from within. Rather than telling him what to do, you let him figure it out. Rather than trying to break down his resistance, you make it easier for him to break through it himself. In short, breakthrough negotiation is the art of letting the other person have it your way. (p. 9)*

The breakthrough strategy has five steps to it. These steps are:

1. Do not react, go to the balcony.
2. Disarm them by stepping to their side
3. Change the game by reframing the dispute
4. Make it easy for them to say yes
5. Make it hard for them to say no

This approach can be used in a wide variety of situations. While a challenging approach to implement, anyone can use it as long as they are patient and committed to reaching interest-based solutions that respond to the needs of all parties to the dispute. In the sections to follow, each step will be discussed.

DON'T REACT, GO TO THE BALCONY!

Go to the balcony is a phrase that Ury used to describe the process of stepping back form the situation in which you find yourself in order to regain your composure and to achieve a fresh perspective.

There is a distinct possibility that you will be angry and frustrated by the attitude and behavior exhibited by a difficult negotiator. If you allow yourself to react to the other bargainer's tactics, then there is a risk that you could make things worse rather than better. Ury points out that "action provokes reaction, reaction provokes counterreaction, and on it goes in an endless argument" (p. 12).

The natural reactions when frustrated by a difficult negotiator are to:

- ☑ **Strike back.** When someone else attacks you, it is natural for you to strike back. For example, if they are rigid in their approach to negotiations, you are also rigid. This suggests that your behavior is a response to their behavior. This approach is rarely successful, i.e., provides negotiated outcomes that are acceptable to both parties. And, it can damage long-term relationships.

- ☑ **Give in.** The opposite of striking back is giving into the demands of the other bargainer. Because of the other bargainer's difficult behavior you agree to their demands just to get the negotiations finished. The problem is that such agreements are seldom satisfactory. You have also reinforced the difficult negotiators dysfunctional behavior by giving them what they want, i.e., an agreement on their terms. You could also acquire a reputation for being a weak negotiator.

- ☑ **Break off the relationship with the difficult person.** It must be recognized that it is occasionally appropriate to end a relationship with difficult people. Avoidance can be the best approach. Ending the relationship may be better than staying in the relationship and risk fighting and exploitation. But doing so can be expensive. You could lose a client or a family could be broken up. Occasionally,, the breakup of a relationship could motivate the party to work harder with you to resolve the problems. Usually, however, adoption of an avoidance strategy, especially if it becomes a way of dealing with others, means that you never learn to effectively resolve the problems you have with other people.

These responses are common but not inevitable. By reacting to the other bargainer's dysfunctional behavior, you lose sight of your ultimate goal, an interest-based outcome good for all parties to the dispute. Often, time, you sacrifice you objectivity and commitment to cooperative negotiations when you respond to the other party's difficult behavior.

Ury recommends that you go to the balcony before this happens. By doing so you may avoid the basic cycle of action and reaction that seldom leads to the cooperative resolution of conflict. By going to the balcony, you can break the cycle, thereby creating conditions more conducive to the negotiation of an interest-based settlement.

Going to the balcony means that you step back, regain your composure and view the situation as objectively as you can. Reference to the "balcony" means that you detach yourself from the situation, and then calmly evaluate the situation in which you find yourself. Suppress your natural impulse to get even or to get out. While in the balcony, think

about how you can get the negotiations back on track and in the direction that you want to go.

Several things need to be done while you are in the balcony.

- ☑ **Remind yourself of what your interests really are.** Remember, interests are the reasons that you take the positions that you do. They reflect the needs, desires, concerns and fears that motivated you to seek a negotiated solution. Ask yourself why you are bargaining. What problem are you trying to solve? With a collaborative approach you assume that you cannot satisfy your interests unless the other party's interests are satisfied as well. Therefore, you need to make sure that you understand your interests as well as those of the other bargainer. When you think about the options available to you, think of them as examples of the types of outcomes that are responsive to your interests. The good settlement would look like these options. The other side may respond favorably to such suggestions, and as a result, you may jointly be able to identify a better option for both parties.

- ☑ **Revisit your BATNA (Best Alternative to a Negotiated Agreement).** In principled negotiations, a good agreement is not one that minimally satisfies your interests. A good agreement must be better than the best situation you would be in if no agreement was reached. A BATNA is the your best no-agreement situation. While in the balcony think about whether your BATNA is better than the agreement that is likely if you bargain to an agreement with your opponent. If an acceptable negotiated solution is unlikely, then walk away from the negotiations. Alternatively, you can think about ways to improve your BATNA. The stronger the BATNA the more assertive you can be when dealing with the other bargainer's dysfunctional attitudes and behaviors. On this important point, Ury has written: "BATNA is the key to negotiating power. Your power depends less on whether you are bigger, stronger, more senior, or richer than your opponent is than on how good your BATNA is…. If you have a viable alternative and your opponent does not, then you have leverage in the negotiation. The better your BATNA, the more power you have" (p. 21).

- ☑ **Decide whether you should negotiate.** Once you have clarified your interests and reconsidered your BATNA, it is then necessary to determine whether you should re-enter the negotiations. If it is unlikely that you a negotiated solution will be better than your BATNA, then terminate the negotiations. Do not

let guilt or fear keep you in a situation that is not likely to yield acceptable results. Do not let the fact that you have already expended lots of time and effort in the process keep you in it. Remember from your accounting and finance classes the concept of sunk costs. However, make sure you have not overestimated the strength of your BATNA. Stay focused on your goal. The negotiated outcome should be better than your BATNA while at the same time acceptably satisfying the other bargainers' interests.

☑ **Name the game.** The other bargainer has engaged in some behaviors that have caused you to go to the balcony. It is important that you identify the tactics the other bargainer is using. By identifying the dysfunctional tactics, you will be better able to deal with them. Ury places distributive bargaining tactics into three major categories:

1. **Stonewalls:** A refusal to move from a position that has been taken. This could be an outright refusal to move from a position ("Our position cannot be changed" or "take it or leave it") or such tactics could involve "footdragging" (We'll get back with you").

2. **Attacks.** Attacks are pressure tactics that are intended to intimidate you and to make you feel uncomfortable. They are intended to make you concede in order to avoid the continued unpleasantness of the other person. An example of this approach would be a statement such as "if you don't agree with us, terrible things will happen to you." By insulting you, badgering you, and bullying you, the other bargainer hopes that you will agree to their terms.

3. **Tricks**. Tricks are tactics that are designed to fool you, and as a result, you do something that you would not normally do. For example, if you assume that the other bargainer can be trusted, a trick would take advantage of that assumption. For example, if you believe that you can believe the information provided by the other party, then you are tricked when the other bargainer gives you a false piece of information that harms you position in the negotiations. In addition to providing false information, tricks could involve claims that the bargainer does not have the authority to reach a settlement when this in fact is not the case. Any good reference on distributive tactics will include a discussion of tricks.

When dealing with tricks, you must first recognize them. For example, if you recognize that the other party is stonewalling, you are more likely to believe they really will move because their resistance is simply a tactic rather than a true position. If they attack you, you are less likely to be fearful because you recognize that it is just a tactic that they are trying to employ. Tricks work best when the other party does not recognize them. Recognize them and let the other party know that you recognize them. When a "spotlight" is placed on the tactic, it is quite likely that the other person will stop using it.

☑ **Know your "hot buttons."** In addition to knowing what the other party is dong, it is also important to recognize how the tactics are making you feel. Is your heart pounding or are your palms sweaty? These feelings should trigger a trip to the balcony. Understand how you feel when you become angry or frustrated, belittled or berated, ignored or rejected. Know when you are likely to respond angrily and when you will be tempted to back away from conflict. Know how you feel when the other side makes you feel guilty. By recognizing your hot buttons, it will be more difficult for the other bargainer to push them.

☑ **Buy time to think.** Once you have figured out what the other bargainer has been doing to you, then take the time needed to think about how to respond. The simplest way to do this during negotiations is to simply pause and say nothing. Give yourself some time to regain your composure. Count to ten (or a hundred) before you resume the discussions. Or, ask the other side to repeat what they just said. Or, you can engage in active listening.

Tell the other side that you want to make sure that you understand the position that they just took. Such tactics will give you a chance to step to the balcony for at least a few seconds. Alternatively, take a time out. When in doubt, caucus. If you need more than a few seconds, take a break. A break can give both sides the opportunity to get back on track or at least not worsen the situation.

☑ **Don't make snap decisions.** Rather than immediately respond to the psychological pressure to make a decision when the other bargainer is present, go to the balcony to make the decision. It is better to insist on some time to review the matter than to make a quick decision that you might regret later. Do not let the other

bargainer hurry you into a decision. Go to the balcony and make a deliberate decision that will serve your interests.

In conclusion, the concern is that you may become your own obstacle to bargaining success by reacting (or over reacting) to the other bargainer's tactics. To help ensure that this does not happen, go to the balcony to get the time needed to regain control over your emotions and to plan out a strategy for future negotiations.

DISARM THEM BY STEPPING TO THEIR SIDE

The second step in the breakthrough strategy is to disarm the other bargainer by stepping to their side. After going to the balcony you have regained your composure and have gotten back into a problem solving frame of mind. Chances are that if you were angry, frustrated and upset, the other bargainer was probably also experiences such emotions. Therefore, the second step of the breakthrough strategy requires you to help the other bargainer regain his composure.

It may be necessary to diffuse the other bargainer's hostile emotions. This can be done by:

- ☑ Getting the other bargainer to listen to your point of view
- ☑ Developing respect from the other bargainer. The other bargainer may not like you but he does need to take you seriously and treat you like a human being.

The secret to this diffusing process is counterintuitive. Think about how the other bargainer expects you to behave. If he is engaging in self-serving, adversarial bargaining, it is quite likely that the other bargainer expects you to behave likewise.

If the other side stonewalls, he probably expects pressure from you. If the other side attacks you, they probably expect you to attack back. The breakthrough strategy requires you to behave in an unexpected manner.

Instead of responding to the other bargainer's tactics in the predictable manner, do just the opposite--step to their side. Listen to them, acknowledge their points, and agree where you can. This is about the last thing a difficult person will expect from you. In distributive bargaining situations, patterning your behavior after that of the other bargainer can work effectively. However, a counterintuitive approach is more likely to get what you want when bargaining integratively.

When you want to negotiate cooperative and the other bargainer insists on an adversarial approach, you need to reverse the dynamic.

If you want them to listen to you, you begin by listening to them. If you want them to acknowledge your point of view, then you have to acknowledge theirs. To get them to agree with you, begin by agreeing with them whenever you can.

It is all too common for negotiations to proceed like this:

- ☑ Person A states point
- ☑ Person B thinks about response to A's point rather than listening to what was said
- ☑ Person B's response is to state his position rather than address the point made by Person A
- ☑ Because Person B did not address A's concern, Person A assumes that person B did not hear what was said and restates his position. By doing so, Person A has not addressed the position put forth by person B
- ☑ In response, Person B concludes he was not heard so he repeats his position while continuing to be unresponsive to Person
- ☑ A's concern
- ☑ The dialogue continues as if both sides are deaf. Because there is little progress, the parties become angry and frustrate.

Rather than engaging in a problem solving dialogue, many negotiations become nothing more than a series of monologues. To interrupt these monologues, you must be willing to listen. There are several techniques that can be used to move from monologues to problem solving negotiations:

- ☑ Active listening. As has been discussed before, successful conflict resolution depends on effective listening skills. Listening can be the cheapest concession you can make. We all have a deep need to be understood, including the other bargainer. By satisfying the other bargainer's need to be heard and understood, the negotiations can be turned around. Listening can be difficult. For many people, it is not really as satisfying as talking. Therefore, it takes discipline to listen to the other party instead of advocating your interests. You cannot sit there and react or plot your next move while the other bargaining is talking. Instead, you have to remain focused on what the other bargainer is saying. Listening may not be easy, but it can be valuable. It gives you:
    1. Insights into the interests and concerns of the other bargainer

2. An opportunity to engage in a cooperative task that could be patterned in subsequent discussions
3. An increased likelihood that the other bargainer will listen to you
4. A way to defuses the other bargainer's anger and frustration

Listen fully, don't interrupt, provide feedback, and if the other bargainer has anything else to say, encourage them to talk by using words such as "Please go on…" or, "then what happened."

It must be emphasized that people genuinely appreciate the opportunity to talk about themselves and their concerns. Once you've heard the other bargainer out, they are less likely to react negatively to your efforts to move the negotiations forward. They are more likely to be more responsive willing to engage in problem solving. It is no coincidence that good negotiators listen more than they talk.

Active listening has several tactics involved with its use:

- ☑ Paraphrase and ask for corrections. The other bargainer cannot tell if you have actually listened to them just by looking at you. You need to demonstrate that you have heard them and that you understand the meaning of what they have said. Paraphrasing means that you sum up what the other bargainer has said and repeating it back to them in your own words. This technique gives the other bargainer the feeling that they have been understood as well as the satisfaction of correcting you if you make a misstatement.

- ☑ Acknowledge the points being made by the other party. After listening to the other bargainer, the next step is to acknowledge their point of view. This may be a problem because you would not be involved in a round of difficult negotiations unless you strongly disagreed with the other bargainer. Rather than viewing this as a problem, try to view the situation as an opportunity. Acknowledging a point of view does not mean that you agree with it. It simply means that out of a range of positions, it is one of them. When you say thing like "I can see how you see things" or "you have point" or " I understand what you're saying," you are simply recognizing their position but not agreeing with it. By acknowledging the validity of their position, you create a situation in which the may be more willing to listen to your side of the story. By listening, you may also be able to defuse any anger or resentment the other bargainer is experiencing.

- ☑ Acknowledging their feelings. Never forget that emotions are a critical component of the typical conflict resolution situation. Behind an attack, you are likely to see anger. Behind stonewalling behavior, you will probably see fear. Until these emotions can be defused, it is unlikely that the other bargainer will hear your arguments. The other bargainer expects you to be emotional, angry and resentful. It can be disarming to be greeted by an acknowledgment that you understand how they are feeling and whether there is anything you can do to help rather than an emotional tirade in response to their dysfunctional behavior. By saying things like "If I were in your shoes I'd be angry too" lets the other bargainer know they've been heard, understood and appreciated.

- ☑ Offer an apology. An apology can be can be the most powerful form of an acknowledgment. Never forget that words like "I'm sorry" can be magical. We often overlook the power of a simple apology. The other bargainer could be outraged because they feel wronged. Very often what they want is to be recognized that they have been wronged. Only when that acknowledgement has been made will the other bargainer feel comfortable enough to negotiate. In other words, the apology helps create a situation in which negotiation can take place. Don't be afraid that acknowledgement of the other bargainer's concerns will be perceived as an act of weakness. To the contrary, an apology can convey strength. Only a confident person could be so gracious. Be calm, be direct, and use the other bargainer's name when making the apology.
  Also, remember that apologizing for any harm you might have cause does not mean that you agree with the other bargainer's position or that you will make a concession to smooth over the situation.

- ☑ Agree whenever you can. To this point, you have listened to the other bargainer and acknowledged their position. The next step is to agree whenever you can. It is hard to continue to attack someone who is agreeing with you. The objective is to agree without conceding. You can do this by focusing on issues on which you agree. While it is natural to focus on differences, doing so can cause problems. Therefore, it may be more productive to focus on common ground. Try to accumulate "yeses". Ury argues that "yes" is another magic word. It is capable of disarming the other bargainer. Look for occasions to say "yes" without making a consensus. "Yes I agree with you." "Yes you have a point there." Also try to get "yeses" from the

other bargainer. Think of a situation in which the other bargainer has criticized an argument that you have made. He claims that the "numbers" upon which you are building your argument are all wrong. Your response could be "You think my proposal is all wrong because of the numbers I'm using?" In response, the other bargainer says "yes." The "yes" is the start of a transformation of an antagonistic argument into a more reasonable dialogue. Each time the other bargainer says "yes" there is likely to be a reduction in tension. As the "yeses" accumulate, you are creating an environment in which the person is more likely to say "yes" to your substantive proposals.

☑ Pace the other bargainer's behavior. Pacing means that you pay attention to the other bargainer's body language and then mimic it. If the other bargainer leans forward, you lean forward. If the other bargainer crosses his legs, you do likewise. This is a technique that is useful when dealing with difficult people. Adapt your style to the other bargainer's behavior. When you do this, you get attuned to the other bargainer and get on the same wavelength. This should facilitate improved communications. When pacing, do not be obvious. Be subtle. If you are successful, you should be able to decrease the psychological distance between you and the other bargainer. You can also pace the language of the other bargainer. If they speak colloquially, you do so also. If the other bargainer is from a different culture, learn a few polite phrases in their native language. This shows interest and respect.

People also use different "sensor languages," depending on which sense they rely most heavily on when processing information. If the other bargainer says things "I don't see your point" or "Let's focus on the issue" or "I can picture what you're saying" chances are the other bargainer is visually oriented. This is in contrast with people who use phrases like "I hear you" or "Listen to this." Still others may use phrases like "I can't get a feel for what you're saying" or "I'm not comfortable with your proposal." It will be easier for you to talk with the other bargainer if you pick up on these speech patterns and then incorporate them into your speech.

When you step to the other side, you listen to the other bargainer, acknowledge their perspectives in terms of both their positions and emotions, and agree whenever you can. Techniques such as active listening and pacing can be invaluable when trying to move from adversarial to cooperative negotiations. By doing these things, you are showing the other bargainer respect. But you are doing so indirectly.

There may be times when you want to address the concerns of the other bargainer more directly. This can be done in several ways:

- ☑ Acknowledge the person. The other bargainer expects to be treated in a certain way (rudely, crudely, inconsiderate, indifference). In other words, you are viewed as an adversary who is expected to treat them in the same way they are treating you. To overcome this problem try using the basic psychological concept of cognitive dissonance. Dissonance is simple a disagreement between pieces of information. Cognitive dissonance involves the disagreement between pieces of information or thoughts. Human beings find cognitive dissonance uncomfortable because the preference is for consistency among our thoughts and beliefs. When dissonance arise, we are motivated to resolve the inconsistency. When you acknowledge the other bargainer personally, you are acting more like a concerned friend or colleague than an adversary. You listen, you empathize, you acknowledge. Because this behavior was not expected, dissonance is created. There is an inconsistency between how they expected and the treatment they actually received. This inconsistency is psychologically uncomfortable and is a motivation of behavior. You have created a situation in which the need to bring cognitions into line. They have to change attitudes and behaviors. It is hard for them to treat you like an adversary if you are treating them like a friend or colleague. There are a couple of ways to do this:

    1. You could acknowledge the other person's competence or authority. If your problem is with your boss, preface your remarks by saying "you're the boss" or "I respect your authority." If the other bargainer has a big ego, view this as an opportunity, not an obstacle. Stroke the ego. Recognize the competence. By doing so, you can disarm them. It will be difficult for them to be nasty or rude to you while you are being so respectful of them and their interests.

    2. Build a working relationship. One of the best ways to acknowledge the other bargainer is to build a work relationship with them. Invite them to supper, have lunch, go out for a drink after work. Develop an understanding of hobbies, or family or whatever interests the other bargainer has. Make small talk. Always be cordial. Little gestures of good will and consideration go a long way. Ury argues that "a good working relationship is like a savings account you can draw upon

in moments of trouble." Don't forget that the best time to establish a good working relationship is before trouble ever begins.

At this point in the breakthrough strategy, you have heard the other bargainer' concerns, you've acknowledged then (both substantively and emotionally), and as a result, the climate for problem solving negotiations has probably been improved. As a result, the other bargainer is more likely to listen to you. This is the time to try and get your point across to them by moving on to problem solving negotiations. This can be done in several ways:

- ☑ Express your views in a non-provocative manner. To do this you have to change the other bargainer's mindset. The standard mindset is either/or. You are right or the other bargainer is right. An alternative mindset is both/and. You can say: "I can see why you feel the way you do. It is entirely reasonable in light of your experiences. My experience, however, has been different." You can acknowledge the other bargainer's view without challenging it. At the same time, you can put forth a contrary perspective. Use of the word "but" is one of the most common ways to express disagreement. "I agree with your basic position, but . . . "Your price is too high," you respond, "but it is the highest quality available." Unfortunately, all the other side hears is "but" which translates into "I think you are wrong and here are the reasons why you are wrong."

  It is not surprising that people tend to stop listening when they hear the "but." Ury contends that people are more likely to be receptive when you first acknowledge their position with a "yes" and then preface your response with the word "and." Instead of yes/but, use yes/and. When there is a complaint about your high price you say: Yes, you're right. Our price is high and that difference in price between our product and our competitor's price buys you superior quality, better reliability and better service." Even if you are in direct disagreement, you can use yes/and statements. "I can see why you feel strongly about this, and I respect that. Let me tell you, however, how this looks from my perspective." "I am in agreement with what you are trying to accomplish. What you may not have considered is this . . ." Regardless of the specific language you use, the key is to present your view as an addition to, rather than a contradiction of, the other bargainer's point of view.

- ☑ I/You Messages. Effective negotiators understand the use of I/you statements. "I" statements talk about you and how you feel. "You" statements are focused on the other bargainer.

When you talk about yourself and your reactions to what the other bargainer is doing, you are less likely to provoke the other bargainer than if you talked about them. For example, think about a situation in which a difficult teenager ahs come home late in violation of the family's curfew rules. It would be tempting for the parents to say things like "you broke your word," " you're irresponsible," "you don't care about how I feel," "you never think about your family." What's the likely response? Defensiveness? Anger? Resentment? Frustration? None of these responses are likely to lead to the resolution of the underlying problem. What if the parent said: "I felt let down last night." "I was worried sick." "I even called the highway patrol to see if you had an accident" These are I-statements that describe the impact of the problem on the parent. By the use of I-statements you provide the other person information about how you feel. Common examples of I-statement include: "I feel . . . " "I get upset when . . ." "'m not comfortable with . . ." " The way I see it . . ." When you use I-statements, you do not challenge the other bargainer's views. Instead, you offer a different perspective. I-statements do not tell the other bargainer what to think, how to feel, or what to do. They are entitled to their opinion. At the same time, you are entitled to your feelings that are shared with the other bargainer through the use of I-statements. Focus the I-statements on your needs, concerns and interests rather than on the behaviors of the other person.

It is difficult for the other bargainer to disagree with how you feel. However, if you say something like "you are irresponsible in your approach to this negotiations," the other bargainer is likely to ague with you. You-statements are likely to elicit further arguments. I-statements have the potential to move the negotiations forward as you provide the other bargainer useful information.

☑ Stand up for yourself. Standing up for yourself does not negate your acknowledgement of the other bargainer's interests. Acknowledgement from someone who is strong is more effective than if it comes from someone perceived to be weak. The combination of seemingly opposite responses, i.e., the acknowledgment of the other bargainer's position and at the same time expressing your own views, appears to be more effective than either by itself. However, make sure that when you express disagreement you do it with the confidence that you will be able to work things out. Recognize the other bargainer's point of view. Assert your own needs, interests and concerns. Be confident enough to express your differences. Be able to express optimism that the differences can be resolved. If you do

all these things, chances are you can overcome the other bargainer's hostility and lack of respect.

By stepping to the other side, you will be able to create an environment that is conducive to problem solving negotiations. Now, within this framework, it is necessary to refocus on the substantive aspect of the dispute. This can be difficult if the other bargainer still thinks that adversarial negotiating tactics will be effective. The third step of the breakthrough strategy is intended to help the other bargainer adopt a cooperative approach to negotiations,

CHANGE THE "GAME" BY REFRAMING THE DISPUTE

By stepping to the other bargainer's side, it is hoped that you have created an environment conducive to effective conflict resolution. While you are ready for a discussion of the parties' interests, the other bargainer is still probably thinking in terms of positions that may be good for them but not necessarily responsive to your needs. The challenge at this stage of the breakthrough strategy is to get the other bargainer involved in problem solving negotiations. To do this, the dispute must be reframed. Ury states that reframing "means recasting what your opponent says in a form that directs attention back to the problem of satisfying both sides' interests" (pp. 60-61).

When this is done, you take the other bargainer's positional statement and refocus them in a problem solving way. To do this, you act as if the other bargainer was trying to solve the problem. As a result, you can draw your opponent into a new game. Reframing builds on the notion that you can put a problem-solving framework around anything the other bargainer has to say. Ury has written:

Because your opponent is concentrating on the outcome of the negotiation, he may not even be aware that you have subtly changed the process. Instead of focusing on competing positions, you are figuring out how best to satisfy each side's interests. You don't need to ask your opponent's permission. Just start playing the new game. (p. 62)

There are several techniques that can g be used reframe the negotiations:

- ☑ Ask problem-solving questions. By asking the right questions, you can get the other bargainer to develop a different perspective on the negotiations. These questions focus attention on each side's interests, the options available for satisfying them, and the standards of fairness that should be used when deciding that a solution is good

for both sides. Examples of problem-solving questions include:

1. Ask why. Rather than viewing the other party's position as an obstacle to successful negotiations, view it as an opportunity to learn more about their interests that are shaping the public positions that have been taken. Why is that important? What is the problem? Why do you want that? What are your concerns? These kinds of questions focus attention on interests rather than positions and can move you toward a problem solving approach to conflict resolution. How a question is asked can shape the other bargainer's response. If a direct question could seem confrontational, then take an indirect approach. Please help me understand want it is that you want? Could you help me understand why this is important to you?

2. Ask why not? Another indirect approach that can be used if the other bargainer is resistant to your efforts to talk about interests is to ask why something would not work.
   Why couldn't we do it this way? As the other bargainer explains why things could not be done in some way other than what he is proposing you can acquire valuable information about the other bargainer's interests. Even the other bargainer does respond to such a question, you can speculate about why the proposal is a problem. You could say something like: I understand this could be a reason why you might not want to accept my proposal, am I right? Ury points out that few people can resist the opportunity to explain to someone else where they do not understand something. If the other bargainer still will not discuss interests it may be because you are not trusted. Then you have to build the needed trust. This can be done by be willing to discuss your interests and risk being vulnerable by sharing such important information with the other party. Then, ask about his interests. Then, provide more information about your interests. Trust can be built incrementally with much risk.

3. Ask what if. Once you have an understanding of both parties' interests, then you can start exploring the options available to you that could satisfy each party's interests. "What if" is a powerful phrase that can move the discussions forward without threatening the other side. Such a question turns the negotiations into a brain storming session that can lead to the invention of mutual gain. The other bargainer's position becomes one option. Through the use of "what if" questions you can develop other options.

4. Ask for the other bargainer's advice. Again, our intention at this stage of the breakthrough strategy is to get the other side to think in terms of interests rather than positions. By asking a question such as "What would you do if you were in my position?" or "What would you suggest that I do?" you can get the other side to start thinking about the problem from your perspective.
The other party could be flattered by your request for advice because you are, in effect, acknowledging his competence and status. Such a tactic can be disarming to the other side while at the same time creates the opportunity to discuss the disagreement from your perspective.

5. Ask "what makes that fair?" Instead of rejecting an unreasonable proposal put forth by the other side, ask them to explain why they thing it the right thing to do. This question can initiate a conversation about the standards of fairness each side is employing during the negotiations. You could say something like: "You must have a good reason for thinking that your proposal is fair. Would you please explain the reasons to me." If the proposal is, in fact, unfair, the other bargainer might realize this as they struggle to answer your question. To start the conversation, it may be necessary for you to propose a standard of fairness. If the other bargainer rejects your proposal then ask them to come up with a better on. By discussing the different standards, you may be able to shift the negotiations from a focus on positions to outcomes that are fair to both sides.

☑ Reframe tactics. In addition to reframe the other bargainer's position, it may also be necessary to reframe the other bargainer's tactics. To move the negotiations forward, you will need to deal with the stonewalls, attacks, and tricks that the other person has been using. Several things can be done to reframe tactics:

1. Go around stone walls. What if the other bargainer says "take it or leave it" or insists that you make a decision immediately? These are stone walls that need to be addressed. You could simply ignore the stone wall. The other person could just be bluffing. Keep talking and act as if you did not hear the statement. If the other bargainer is serious the stone wall will be put up again. If it was just a bluff, then the other bargainer may be willing to talk about other topics.

2. Reinterpret the stone wall as an aspiration. In response to the other bargainer's strong statement (We got to have…) say something like "we all have wants and needs. Let's take a look at the full range of possibilities that area available to us." Or if they say "We have to have a deal by tonight" you can respond by saying "that would be great. We better get to work right away."

3. Take the stone wall seriously but test it. For example, if the other bargainer says "I will call you in two hours with your answer" be away from the phone in two hours. Be in a meeting or be handling an "urgent" problem. If they don't call in two hours, they were bluffing. If they believe you are uncontrollably tied up when they called, they will usually give you another chance.

4. Deflect the attack. In response to threats, insults, or blame, you need to shift the focus to the problem and away from the attack. You could simply ignore the attack. Just pretend that it did not happen. If you respond to the attack, you reinforce the use of such tactics. If the other bargainer sees no response from you, he is less likely to rely on such tactics. Remember, behaviors that are ignored or punished are less likely to be repeated than behaviors that are reinforced.

5. Reframe the attack as an attack on the problem. Attackers are usually making at least two points when they attack you. They are saying that your proposal is no good and they are saying that you are no good. You can choose which message to respond to. Ignore the attack on you and focus on the attack on the problem. Ask the other person to suggest how the problem could be solved. By choosing to pursue the more legitimate criticism, you avoid the personal assault and refocus the other bargainer's attention on the problem that you are trying to solve.

6. Reframe the attack as being friendly. With this approach you "misinterpret" the attack as being friendly rather than hostile. For example, express appreciation for the other bargainer's concern about you and the problem.

7. Reframe from past wrongs to future remedies. Use an attack as an opportunity to move from mistakes that could have been made in the past to ways to improve conditions in the future. For example, if the other bargainer criticizes you for past incidents, use this as an opportunity to ask about what can be done to make sure the problem never arises again.

8. Reframe from "you" and "me" to "we." Positional bargaining relies heavily on works like "you" and "me." "You made a mistake." You are making these negotiations more difficult than they need to be. I have the right idea while you are wasting my time." Such language heightens the differences between the parties and stands in the way of problem-solving negotiations. The objective is to get the parties thinking about mutual or shared concerns. "We have a problem. What can we do to solve it?" Ury argues that a simple and powerful way to reframe "you" and "me" to "we" is through body language. Rather than sitting across the table from each other, sit side-by-side. Rely on a document that has to be shared.

While such tactics do not make conflict go away, they can underscore the belief that by working together problems can be resolved.

9. Expose tricks. Tricks are difficult to reframe. Often times the tricks work because the other bargainer has used the language of cooperation, trust, and reasonableness in order to exploit you. It is difficult to move past such tactics. However, to refocus on problem solving, the tricks must be exposed so that the other bargainer knows that you will not succumb to such tactics. There are several ways to deal with tricks

10. Ask clarifying questions. Look for assumptions or ambiguities that could be the basis for tricks. Identify contradictions that could develop when the other bargainer tries to be deceptive. If you become suspicious of the other side, challenge them. Ask clarifying questions and press for answers. Challenge contradictions. Hold the other bargainer accountable for the trick by making them explain what they have done. Asking questions that force accountable may be less threatening than directly raising you concerns. Rather than saying "I think you are lying to me" ask them to explain why they hold the position they have taken.

11. Make reasonable requests. Identify a reasonable question that the other bargainer would have to agree to if he was genuinely cooperative and not relying on tricks to get what he wants. For example, if you are negotiating with a person over the purchase of a used car and you think that he is hiding information about the car's condition, you could ask "Would you mind if I took the car to my mechanic for an inspection." If the car is in good shape, the seller probably will nor mind if you have the car inspected. However, if the seller is being deceptive, then he may refuse to let you have the car inspected. If this happens, then you cannot depend on what you have been told about the car's condition by the seller.

☑ Negotiate about the rules of the game. If the other bargainer continues to be difficult by stonewalling, attacking you, and using tricks, despite your best efforts to refocus discussions in a problem-solving way, then the conversation has to be taken in a different direction. You need to talk about how the negotiations are being conducted. If you have not been successful when trying to reframe the negotiations, it is then necessary to explicitly discuss the other bargainer's behavior and their effects on the conflict resolution process.

1. Openly discuss the behavior. It is possible that the other bargainer is trying to see what he can get away with. State that you recognize the tactics being used and announce that the tactics are not going to work. Then insist that if the other bargainer wants an agreement, a different approach has to be taken. When doing this it is important that you do not do it in a way that will be perceived as an attack on the other bargainer. Make it easy for the other person to change tactics. Instead of saying, "you're threatening me" say it was not your intention to threaten me, was it?" If the person is being rude, offer the explanation that he must be having a bad day. Try not to be accusatory. But, make sure that the other party knows that your will not tolerate their dysfunctional behavior.

2. Negotiate about the negotiation. If raising your concerns does not lead to the desired change in the other bargainer's behavior then you may have to explicitly negotiate the terms under which the bargaining will continue. Be willing to negotiate about the process just like it was a substantive issue. Talk about the rules for the negotiations in terms of interests, generate potions and discuss the standards that can be used to determine whether the parties' behavior is fair. As part of this process, you may have to specifically request at the other bargainer change some behaviors. Once you get an agreement on the rules, then you can start negotiating over substantive issues again hopefully in a more constructive way.

The turning point in a difficult negotiation takes place when you are able to move from positional or adversarial negotiations to problem-solving negotiation. Reframing is a critical part of this conversion process that is challenging but can be done with an understanding of bargaining dynamics and lots of patience.

MAKE IT EASY FOR THEM TO SAY YES BY BUILDING A "GOLDEN BRIDGE"

So far, we've gone to the balcony to regain our composure and to refocus on the "prize" (an efficient and wise agreement that does not hurt our relationship with the other bargainer. Then we stepped to their side to help the other bargainer get them back on track and ready for problem solving negotiations. Then we tried to reframe the issues. Because they are probably still holding on to some position that you find unreasonable, it is necessary to put a new frame around the other bargainer's positions and tactics. By so doing, you can move to a problem solving approach to negotiations that builds on interests of the parties. It is at this point that you can explore the interests and the positions that might be responsive to needs and concerns of both parties. Even after you have disarmed the other bargainer and have engaged in problem-solving negotiations things can still go wrong. After you have explored the interests and discussed your options you may think you are ready to make a deal but don't relax too soon.

When you make your proposal, watch and see the response. If the other bargainer stalls, makes vague statements, delays, reneges, or flat out says "no,' you know that the other bargainer is resisting a final decision. While this may be distressing, there is usually some good reason for it and it becomes incumbent upon you to overcome this resistance. Ury calls this process "building a golden bridge." In other words, make it easy for the other side to finalize an agreement.

Ury has identified four obstacles to reaching agreement.

- ☑ The first concern is that the other side rejects your proposal because it was not his or her idea. To overcome this concern Ury recommends that you involve the other bargainer in the resolution of the problem. Instead of unilaterally pronouncing that you have found the solution to the problem, encourage the other bargainer to participate. The literature on participation in decision making suggests that meaningful involvement of the other side in decision making lead to better decisions and decisions to which the other side can commit.

With this in mind, the building golden bridges requires that you encourage the full involvement of the other side in the solution. Ury recommends several approaches for securing the other bargainers participation:

1. Ask the other bargainer for ideas. Ask how he would solve the problem. What the other bargainer would do if he was "king for a day" or what he would do if "he was in your shoes."

2. Once you have the other bargainer ideas, build on them. This does not mean outright acceptance. It means building on the most useful aspects of them into your solution.

3. You can get the other bargainer involved by asking for constructive criticism of your ideas. This can be done by using problem solving questions such as "which interests of yours are not met by this proposal?" or "in what way is this proposal unfair?" Answers to such questions can generate information that will make for a better solution.

4. If the other bargainer resists your efforts to explore for a solution, provide choices or options. For example, ask whether the other bargainer would you prefer this or that? Once the other bargainer reflects an opinion, it becomes his idea. When concluding this section on approaches that will get the other bargainer involved is the forging of an agreement, Ury relied on a Chinese proverb: "Tell me and I may listen. Teach me and I may remember. Involve me and I will do it."

☑ A second obstacle to an agreement could be unmet needs perceived to exist by the other bargainer. It is quite possible that despite all your efforts to reach an agreement responsive to the other bargainer's interests, you might have overlooked some important factor that, if not addressed, will preclude agreement. While it would be easy to assume that this predicament is because the other bargainer has been irrational, inflexible or just plain ignorant, this may not be the case. It could be because you simply missed something important while working toward an agreement.

To deal with this obstacle, you can put yourself in the other bargainer shoes (i.e., think empathetically) and critically thinking about the deal and whether you could accept it if you were other bargainer, and if not, why would you not be willing to accept it. A hard look at your position from the other party's perspective is likely to provide insights concerning the other bargainer's unwillingness to reach an agreement.

☑ A common mistake is that you assume that the other side is only concerned with money. Ury recommends that you don't overlook other basic, less tangible human needs such as security and recognition. If you can recognize these basic needs at play and respond to them, you can increase the likelihood of reaching an agreement. Make sure that you do not impose a "fixed-price" assumption on your solution. At this stage of negotiations, you may be able to still sweeten the deal for the other side while maintaining your interests. One way is to look for low cost, high benefit tradeoffs. Think in terms of things you can give to the other side that would be valuable to the other bargainer but not very costly to you. In labor/management relations, for example, union security clauses would be an example. They are very valuable to the union and almost costless to the employer (if cost is measured in dollar terms).

☑ Another approach is to use "if, then" formulas. There was a consultant who worked as an expert witness in court cases. He charges a very high fee that attorneys, especially plaintiff attorneys who usually work on a contingent fee basis, resist. When the attorneys complain, the consultant says "my normal fee for a case like this if $10,000. However, if you lose, I'll charge you $5000 but if you win then my fell will be $20000." With this approach, he takes some risk out of the situation. But because he is very good at what he does, he is confident that he will get the higher fee.

☑ The third obstacle to agreement concerns the other bargainer's need to save face. Face saving is more than a procedural nicety and more than a mere "bandage" for a wounded ego. Instead, face saving is intimately entwined with the other bargainer's dignity and self-worth. If the other bargainer has to change positions to reach agreement with you, the need to save face may be at play.

Therefore, it is important for you to make it easy for the other bargainer to save face. There are several ways to do this:

1. Demonstrate how the circumstances have changed. Originally the other bargainer was right, but in light of changed circumstances, another position is warranted.
2. Ask for a third party recommendation. Use of mediation is an excellent way to resolve a dispute. A proposal unacceptable if it comes from you may be acceptable if it comes from a respected third party.
3. Rely on a standard of fairness. This is where objective standards out of getting to yes can come into play.

Ury recommends that you help the other bargainer write his victory speech. Help the other side describe the outcome in positive terms. Anticipate how the other bargainer's audience might criticize the settlement and help identify rebuttal arguments. Make sure you let the other bargainer the credit for the settlement if doing so would help secure an agreement.

☑ The fourth obstacle to agreement identified by Ury is that things are going too fast. It may be necessary to slow the process down and proceed in an orderly, step by step fashion in order to get an agreement. You do not want the other bargainer to get overwhelmed by the amount of work that needs to get done. You do not want them intimidated by the uncertainty of the situation. You want them to believe a settlement is possible and that progress is being made. Go slow, be optimistic, be reassuring, break big projects into little ones (e.g. let's experiment), and make sure all parties understand to what they are agreeing.

In summary, building a golden bridge involves more than just formulating a proposal that might be attractive to the other side. It also involves getting the other side involved in the idea creation process, looking beyond obvious interests like money so that the proposal can also be responsive to other basic, less tangible interests, it may mean taking other bargainer by the hand so that they are not overcome by the challenges that face them. If you can do this, you can build a bridge free of obstacles. The other bargainer can come to you in an agreement that is responsive to both sets of interests.

However, what happens if after all your efforts, the other side still won't agree? This concern takes us to the last step of the break through strategy. You have to be able to make it difficult for the other bargainer to say no to your proposals. Ury encourages you to bring the other bargainer to their senses, not their knees. You do this by making it difficult for the other bargainer to not accept your proposals.

MAKE IT HARD FOR THEM TO SAY NO

Once again, the breakthrough strategy is counterintuitive. Despite all your efforts to present a settlement that responds to both parties' interests, the other bargainer may still resist. This is probably because the other bargainer still thinks he can win the negotiations. Therefore, the tactical agenda at this stage of negotiations is to convince the other bargainer that they cannot win.

At this stage of the bargaining process, it may appear to you that your problem solving approach has not worked. Therefore, you might be tempted to abandon the problem solving approach and adopt an approach based on power. Rather than holding out a golden bridge, you might be tempted to try to force the OB into an agreement.

Ury points out that when you switch from problem solving to power, a number of things happen:

- You stop listening and acknowledging and start threatening
- You stop reframing the other bargainer's position and start insisting on your own
- Instead of making it easier for the other side to say yes, you justify their intransigence

What is the likelihood that your shift to a power based approach will get you the agreement that you want?

It is not likely to work.

The idea behind power is that you force the other bargainer to agree with you by threatening some harm. To avoid the harm, the other bargainer backs down. Ury argues that unless you have a decisive power advantage, the approach probably will not work.

How will the other side probably respond to your power tactics? Anger, hostility frustration, resentment? The use power by you is likely to cause the other bargainer to dig in and stick to their position thereby frustrating your attempts to get an agreement on your terms.

You've created a situation in which agreement is less likely because conceding now means defeat to the other bargainer. Now you've gone from situating with a win-win potential to one that could yield a lose/lose outcome. Despite these concerns, Ury still recommends the use of power if the OB cannot be enticed across the golden bridge.

Ury emphasizes that power should be used to bring the other bargainer to his senses, not to his knees in defeat.

Power has to be used subtly and in non-traditional ways to educate rather than subjugate the other side. Assume that the other bargainer has miscalculated how best to achieve his interests then focus his attention on avoiding the negative consequences of not reaching an agreement. Little effort is expended trying to impose your position on the other bargainer. Instead, you create a situation in which the other person realizes that the agreement you propose better meets his needs than his no-agreement alternative.

Ury recommends a number of tactics that rely on power to encourage the other bargainer to cross the golden bridge you have offered.

- ☑ Remind the other bargainer of the consequences associated with not reaching your agreement. This can be done by the use of reality-based questions such as: "What do you think will happen if we don't reach agreement?" This focuses attention on BATNA relative to your agreement. "What do you think I will do?" This is a way to get the OB to consider your BATNA. It can bring the OB back to reality in case he has underestimated your BATNA. "What will you do?" This is another way to get the OB to determine whether he has overestimated his BATNA.

- ☑ Warn, not threaten. This is a subtle distinction that could be easily misinterpreted. Consequently you must use this tactic very carefully. Ury points out that asking questions might not be enough to get the other bargainer to fully consider the consequences of not reaching an agreement. It may be necessary to make a direct statement concerning what will happen if an agreement is not reached. This means that before you exercise your BATNA, you let the other person know what you are going to do. You say – "Here's what I am going to do if we don't settle this matter." The hope is that your opponent will take advantage of the opportunity to reconsider his refusal to negotiate. Such a statement sounds like a threat but if presented property it will not elicit the reaction a threat would. Attach both negative consequences to the failure to reach agreement. However, Ury contends that there is an important distinction.

A threat appears subjective and confrontational while a warning appears objective and respectful. A threat is a negative promise. It announces your intention to impose pain and injury on the other bargainer. A threat specifies what you will do to the other person if he does not agree with you. In contrast, a warning is a statement describing what will happen if an agreement is not reached. It describes the objective consequences associated with not reaching agreement. The key is to avoid a confrontational tone and be respectful of the other bargainer. You simply present the information in a neutral tone and then let your opponent decide. With this approach, the OB might be coaxed back into problem solving negotiates.

- ☑ Be willing to exercise your ability to carry out your BATNA if the other bargainer ignores your warnings. Demonstrate what you plan to do. This is a way to educate the other person without actually carrying out your BATNA. You could walk out of negotiation and tell the OB to call when he is ready to bargain again. You could demonstrate you have plans in place to implement your BATNA. However, remember that the purpose of such moves is to remind the other side that you do not have to reach agreement. By so doing it is hoped that the other bargainer will see that the golden bridge affords a better outcome than his BATNA. It may be necessary to use your BATNA if the other side will not negotiate. If you do so, go forward in a non-confrontational way.

- ☑ Use the minimum power necessary. Exhaust all your options before escalate. Use power as a last resort and use it to the least degree possible. For example, if a union went on strike, it should do so peacefully. If you are an employer who locks out it employees, do hire replacement workers. And when power is exercise, make sure it is legitimate power. Do not break the law or otherwise engage in behaviors that would permanently harm the relationships.

- ☑ Be ready to neutralize the other bargainer's exercise of his BATNA. If you are an employer and the union threatens to go on strike, be prepared to deal with the strike. If the other bargainer threatens to go over your head and talk to your boss, make sure that you talk to your boss first. Your objectives is not to hurt the other side but to demonstrate the negotiation offers a better chance of reaching a favorable agreement than not negotiating.

- ☑ Bringing in a third party could also help. This can increase your leverage so that the other bargainer will negotiate. You could build a coalition, take the message to the your opponent's constituency, or bring in a mediator to help resolve the problem.

Throughout this entire process, your objective has been the same. You have tried to remind the other bargainer about the costs of not reaching agreement relative to the offer represented by the golden bridge. It is important that throughout this process you keep a good alternative on the table so that the contract between agreeing and not agreeing is obvious. By doing this it is hoped that the other person will see that his needs can best be met by crossing the bridge. With this approach, power becomes an extension of the problem solving process not a replacement for it. You exercise power to get the other bargainer back to problem solving negotiations. Ury points out that just like the best general never fights, the best negotiator never uses his BATNA.

In conclusion, with the breakthrough strategy, the idea is to turn adversaries into partners.

While it takes two to tangle, only you have to untangle tough situations by using the breakthrough strategy. You have the power to do so and to do so unilaterally. By turning adversaries into partners you assure that conflict is resolved in terms favorable to your interests.

Bargaining is more than a set of tactics to be employed effectively, at the right time. There are also a number of skills that are needed to implement the bargaining strategies and tactics. Effective negotiators are good communicators, have well-developed problem solving skills and are creative when dealing with the problems that arise during the bargaining process.

The preceding primer on negotiations was typical of a basic college course in negotiations. The following section entails a negotiation primer from the real world of business, mediators, and lawyers.

One of the most difficult times for the new labor specialist is sitting down to your first contract negotiations. These two primers on negotiations, combined with the earlier primers on communications, conflict resolution, and problem solving will hopefully give you tools you need for negotiation confidence!

CONDUCTING NEGOTIATIONS – A REAL-WORLD VIEW

A Primer on Successful Negotiation

By David A. Hoffman, JD, Boston Law Collaborative

I. Introduction

Negotiation has a bad name in our culture.[1] Recall one of the opening scenes in the recent film "Air Force One," in which the President of the United States, played by Harrison Ford, castigates himself and other foreign policy makers for their willingness to negotiate with terrorists and vows never to negotiate again. Or, recall the hero of the science fiction film "The Fifth Element," played by Bruce Willis, who offers to negotiate with one of the villainous Mangalors who have captured the control room of the spaceship and then, when face to face with the chief Mangalor, quickly shoots him squarely between the eyes, while an impressed colleague asks: "where did he learn to negotiate like that?"[2]

In these films, and in much of our culture, negotiation is treated as an activity suitable only for unprincipled wimps ("Air Force One") or indecisive fools ("The Fifth Element"). Moral: real men and women don't negotiate.

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[1] My frame of reference, for purposes of this article, is the mainstream culture of the United States, as depicted in the popular media. The culture of the United States is, of course, composed of many sub-cultures, including many that differ in significant respects from that of the mainstream.

[2] Thanks to Robert Benjamin and Peter Adler, whose 1999 SPIDR conference workshop on negotiation and film highlighted these films, and others, as a window into our culture's ambivalence about negotiation.

Yet the reality is that we negotiate all the time. If we have young children, we are engaged in negotiation from the minute they wake up -- over such weighty subjects as what they are going to eat for breakfast or wear to school. If we drive to work, we are "negotiating" the traffic to get there. If we are married or in a domestic partnership, negotiation is how we decide what videos to rent and when the refrigerator needs cleaning. Virtually every aspect of our lives involves negotiation -- even negotiations with ourselves (over what we will eat, or not eat, how we will spend our time, etc.)

In the workplace, negotiation is likewise ubiquitous. Almost every aspect of workplace activity requires coordination and teamwork, and negotiation lies at the core of those activities. A company's relationship with its employees is the product of a series of negotiations over the terms and conditions of employment and other issues relating to the employee's responsibilities. The satisfactory resolution of those issues depends on the ability of both management and employees to negotiate productively. Thus, effective negotiation can make the difference between a successful company and one that is not.

What is effective negotiation? Lawyers and social scientists who have studied negotiation behavior offer several answers to this question, and their answers have evolved rapidly in the last twenty-five years. Sections II - IV below briefly describe that evolution, and Section V suggests some future directions.[3]

II. Positional Bargaining - Negotiation Tactics

The early 1980s represent a watershed in the literature of negotiation. In 1981, Roger Fisher and William Ury published *Getting to YES: Negotiating Agreement Without Giving In*, arguably the most influential book ever written about negotiation.[4] *Getting to YES*, which has been translated into 18 languages and has guided the training offered to world leaders through the Program on Negotiation at Harvard Law School, offers a vision of negotiation as a principled activity in which the participants can each be made better off.

However, prior to the publication of *Getting to YES*, negotiation was typically viewed as an activity in which two or more parties each vied for advantage at the other's expense. The best negotiators were those who succeeded in obtaining the largest slice of the pie, with little attention paid to whether the pie could be expanded in some way.

A. HARDBALL TACTICS

Typical of the literature of the pre-*Getting to YES* era is the advice given to legal services lawyers by Michael Meltsner and P.G. Schrag in their book *Public Interest Advocacy: Materials for Clinical Legal Education*.[5] Their suggestions for negotiators combine such common sense advice as thorough preparation with a

[3] The following description of recent developments in the field of negotiation touches on only some of the major themes and is not intended as a comprehensive survey of the field.

[4] An expanded second edition was published in 1991 by Fisher, Ury, and Bruce Patton. In 1982, Howard Raiffa published *The Art and Science of Negotiation*, which applied game theory and economic analysis to the study of negotiation and which was also influential.

[5] A similar orientation can be found in G. Bellow & B. Moulton, *The Lawyering Process: Negotiation* (1981), which focuses on the skills needed for successful negotiation.

set of techniques designed to manipulate, deceive, or intimidate the opponent. The unspoken assumption in these suggestions is that the opponent is willing to take advantage of the negotiator -- fairly or unfairly -- and therefore success requires using competitive negotiation techniques, and using them more effectively than the opponent. The following is a short list of the techniques Meltsner and Schrag recommend:

- Arrange to negotiate on your own turf.
- Balance or slightly outnumber the other side.
- Time the negotiations to advantage.
- Lock yourself in.
- Designate one of your demands a "precondition."
- When it is in your interest, make the other side tender the first offer.
- Make your first demand very high.
- Place your major demands at the beginning of the agenda.
- Make the other side make the first compromise.
- Use two negotiators who play different roles.
- Be tough — especially against a patsy.
- Appear irrational where it seems helpful.
- Raise some of your demands as the negotiations progress.
- Claim that you do not have authority to compromise.

Many of these techniques are as repugnant as they are common. Like the behavior all too many of us experience when we buy a car in an auto showroom, negotiation tactics of this kind involve treating the other party in a negotiation as a de-personalized enemy. They reflect an individualistic world view in which negotiation is merely the more civilized version of an otherwise vicious competitive struggle for advantage.

One of the hallmarks of this style of negotiation is the manipulation of the other party's point of view. For example, lecturers on the subject of negotiation like to tell the story of a mistake made by organizers of the presidential campaign of Theodore Roosevelt who printed up thousands of copies of a campaign flyer with a photograph of Roosevelt lifted from the popular press. Unfortunately, no one had asked the photographer for permission to use the photo. The campaigners anticipated having to pay the photographer a fortune because reprinting the flyers would be costly. Instead of negotiating the price, however, they sent him a telegram informing him that his photograph had been selected from among several others, but that he would have to pay a modest fee in order for his photograph to be used. He forwarded the money, and the flyers were distributed.

Obviously, there are disadvantages to negotiating in this way with employees, who would resent being deceived or treated like the enemy. Behavior which is the norm in the commercial marketplace or the auto

showroom, where buyer and seller are unlikely to meet again, is unsuitable for workplace settings, where the employer and employee maintain an ongoing relationship. Clearly, a more collaborative mode of negotiation is needed in that setting.

B. COOPERATIVE VS. COMPETITIVE BARGAINERS

In the late 1970s and early 1980s, Prof. Gerald R. Williams began a series of experiments to determine whether cooperative styles of negotiation could be as successful as competitive styles.[6] He videotaped mock negotiations involving experienced lawyers from across the United States, and he polled the lawyers about the characteristics and effectiveness of the attorneys with whom they routinely negotiate. His findings showed that 65% of the lawyers were viewed as cooperative, while only 24% were considered competitive. Williams also found that the perceived effectiveness of negotiators did not correlate with their competitive or cooperative orientation. In other words, there were effective cooperative negotiators, just as there were ineffective competitive negotiators, and vice versa.

One of the goals of this exercise was to identify the characteristics of effective negotiators -- regardless of whether they were cooperative or competitive in style. Williams found the following characteristics (among others) were common to both types of effective negotiators: rational, experienced, perceptive, creative, analytical, self-controlled, intelligent, honest. The import of Williams' research was to counteract the view that the most successful negotiators are those that use competitive techniques, such as those recommended by Meltsner and Schrag. The meaning of these studies for the employment field was that managers could adopt more cooperative styles of negotiation without necessarily giving up any advantage to the employees.[7]

III. Interest-Based Bargaining - Principled Negotiation

As noted above, with the publication of *Getting to YES*, Roger Fisher and William Ury introduced a fundamentally different approach to negotiation. Instead of examining the personal characteristics of negotiators, or even the specific techniques they used (i.e., competitive vs. cooperative), Fisher and Ury argued that the most successful negotiators will focus on interests rather than positions.

A. GETTING TO YES

One of the important insights of *Getting to YES* is that successful negotiation often requires separating the people from the problem. In other words, reactions to proposals (particularly critical reactions) should be couched in such a way that the criticism is not taken personally by the other party. Fisher and Ury also advocate the use of principled benchmarks for resolving contested issues -- e.g., the fair market value of a car or house. By seeking out objective criteria for the resolution of disputes, the parties can be spared to some degree from the intense struggle over whose view shall prevail. A third vital insight offered by Fisher and Ury is that effective preparation for negotiation requires

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[6] See G. Williams, *Legal Negotiation and Settlement* (1983).

[7] In addition to the important perspective added by Williams' research on personality characteristics, a wealth of other descriptive studies of negotiation explore the ways in which race, culture, and gender (among other traits) affect bargaining. See, e.g., D. Tannen, *You Just Don't Understand: Women and Men in Conversation (1988).*

careful consideration of each party's BATNA -- their best alternative to a negotiated agreement. Unless and until each party knows their respective BATNA's, they will lack a principled basis for determining whether they should accept any given proposal or set of proposals. Finally, Fisher and Ury emphasize the importance of using negotiation to communicate about underlying interests so that mutually advantageous exchanges can occur. Using this technique, negotiating parties can expand the pie and thus create

win-win" results in which each of the parties is made better off than either could be in positional non-interest-based bargaining.[8]

> *Example: In a negotiation with a prospective sales manager, the company offers a salary and bonus package that is similar to that available in other firms of comparable size. The company says its goal is rapid expansion of its market. The prospective employee says that she does not need much of a guaranteed salary but wants to participate in the growth of the company and therefore offers to take a much lower salary in exchange for a bonus based on a fixed percentage of sales beyond the company's currently projected targets. Each side assesses its BATNA -- for the prospect, going to another firm; for the employer, looking for another sales manager -- and concludes this deal is better than the available alternatives. They sign an employment agreement incorporating these terms.*

B. THE CRITIQUE OF *GETTING TO YES*

Critics of *Getting to YES*[9] have assailed its optimistic assumption that negotiators will be candid about their true interests. Critics also pointed out that, with their emphasis on expanding the pie, Fisher and Ury had paid insufficient attention to the techniques bargainers use to maximize their share of the pie. Some critics questioned whether using Fisher and Ury's value-creating techniques might leave a negotiator vulnerable to the value-claiming techniques of the competitive bargainer. Moreover, while the Fisher-Ury approach may hold promise in settings where the parties have an ongoing relationship, its value seemed less obvious in settings (such as tort litigation) where the parties have no relationship, there are few if any opportunities for joint gains, and the goal is simply welfare maximization.

The Fisher-Ury techniques do not appear to have been widely adopted in the workplace. Indeed, except in the area of compensation (where bonuses and commissions create opportunities for joint gains), it is unusual to see true "win-win" bargaining between management and employees; most decision-making is done hierarchically.

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[8] Fisher and Ury use the example of two children negotiating over an orange. They decide to cut the orange in half, which leaves each of them dissatisfied, but at least equally so. If they had employed interest-based negotiation, they would have learned that one of them wanted the orange rind for baking, while the other wanted only the pulp of the orange for juice. In other words, had they communicated about their interests, each could have had the equivalent of a whole orange.

[9] See, e.g., J. White, "The Pros and Cons of "Getting to YES," 34 J. Legal Ed. 114 (1984).

IV. Integrating Positional and Interest-Based Bargaining

The arrival of *Getting to YES* and its critique of positional negotiation turned the attention of negotiation scholars, researchers, and practitioners from the refinements of technique to the question of which fundamental orientation to negotiation is best. The Fisher-Ury analysis suggested an irreducible tension between integrative and distributive approaches to bargaining:

Interest-Based/Integrative	**Positional/Distributive**
• Creating value	• Claiming value
• Cooperative	• Competitive
• Win-win solutions	• Win-lose outcomes
• Joint gains	• Zero sum
• Expand the pie	• Claim the biggest piece

The next challenge, then, for those seeking to find the most promising methods of negotiation, was to reconcile, or at least develop strategies for managing, the tension between these two fundamentally different orientations to negotiation.

A. Game Theory

An experiment with computer programs, described in Robert Axelrod's book, *The Evolution of Cooperation,* in 1984, sought to determine the best method of handling a type of negotiation called the Prisoner's Dilemma. In the Prisoner's Dilemma, the negotiators communicate with each other only through their behavior.[10] They are rewarded or punished for their behavior according to the following matrix, which is used to score each round of either cooperative or competitive moves:

		A's Behavior	
		A Cooperates	A Competes
B's Behavior	B Cooperates	A and B win	A wins big; B loses big
	B Competes	B wins big; A loses big	A and B lose

In this matrix, it is possible for one party to take advantage of the other party's cooperative moves, but not for long. Once it becomes apparent that one party is going to make competitive moves, the other party will do so as well. The winning computer program employed a simple tit-for-tat strategy: the program always began with a cooperative move but then mimicked the competing program's move on the previous round.

[10] For a description of the Prisoner's Dilemma, see R. Fisher & S. Brown, *Getting Together: Building Relationships as We Negotiate* 198 (1988).

In the context of a real-life negotiation, this strategy suggests the value of disaggregating any negotiation into a series of moves so that the bargainer can determine whether the other party is willing to make a cooperative, value-creating move, or a competitive value-claiming move.

> *Example: In a negotiation over a severance package, the Human Resources manager refrains from making an initial offer; instead, she begins by asking the former employee what he is looking for. The employee responds by asking what the company's typical severance packages have been in recent years. They agree to exchange information about these two subjects before making any offers or counter-offers. They also agree on a time to do so. They then discuss arrangements for giving the ex-employee access to his personnel file. By the time they begin discussing the severance terms, each feels more trusting of the other because they have been able to cooperate on the preliminary steps in the negotiation.*

The bottom line is that every negotiation has not only the potential for integrative and distributive moves, but also a need for such moves. At least in theory, the most successful negotiations would involve efforts by the parties to expand the pie to the greatest extent possible and then divide it without mutually destructive conflict. Accomplishing such an objective, however, requires overcoming a number of barriers.

B. Overcoming Barriers to Settlement

One of the barriers to optimal results in bargaining concerns communication. The Prisoner's Dilemma game, which radically oversimplifies real-life bargaining, does not permit communication. In ordinary, day-to-day settings, negotiators can communicate with each other between rounds of bargaining and thus attempt to secure agreements on bargaining behavior. Even so, negotiators will often fail to make optimal deals because of flawed communication, or barriers to effective communication.[11] One example is the phenomenon of reactive devaluation, a process in which our perceptions are influenced by the source of the information.

> *Example: A manager looks at the strong resume and excellent salary history of a prospective employee and concludes that she will probably have to offer him a salary of $50,000/year. The company could afford to do so but wants to pay as little as possible. The employee asks for $45,000/year. The manager is puzzled, mentally devalues the prospect, and concludes there must be something about him or the market that she does not know. Under these circumstances, the manager offers the employee $42,000, and he decides to go elsewhere. In this situation, the employee and the company could have struck a deal at a salary of $45,000 - $50,000 and both would have been better off.*

[11] For a fuller discussion of this phenomenon, see R. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 Ohio State Journal of Dispute Resolution 235 (1993).

Negotiation theorists have identified other barriers to successful negotiation, such as cognitive dissonance, loss aversion, and strategic bargaining. According to Robert Mnookin, each of these barriers can, in theory, be overcome by improved communication and more rational methods of option assessment. He points, in particular, to the use of mediation as one method of overcoming such barriers to successful negotiation.

V. Successful Bargaining - Lessons from the Field of Mediation

The process of mediation -- in which a neutral third party facilitates negotiation -- provides a useful lens through which to assess the effectiveness of negotiation. An intermediary can often provide a useful buffer for communications which might otherwise be devalued or go unheard. (For example, in the salary negotiation described above, an intermediary could have communicated separately with the company and prospective employee and made a proposal that would have been accepted by both sides.) There are other lessons, however, that the practice of mediation teaches.

A. EMPOWERMENT AND RECOGNITION

In their recent book, *The Promise of Mediation*, Robert Baruch Bush and Joseph Folger articulate a new rationale for the practice of mediation. Previous discussions of the subject had taken as their premise that the settlement of disputes was the primary reason for employing mediation. According to Bush and Folger, however, the primary value of the process is its ability to (a) empower participants to identify and articulate their needs and perspectives; and (b) provide opportunities for mutual recognition. Bush and Folger describe their model as based on a "relational," as opposed to an individualistic, world view. From their perspective personal transformation is a more valuable goal than solving problems. Within the world of mediation, this hypothesis is considered controversial.[12] However, it is instructive as a perspective on the meaning of "effective" negotiation.

For purposes of negotiation in the workplace, for example, this perspective suggests that even in those settings where management is unable (for one reason or another) to approve a particular request from an employee, the manner in which the employee is treated may satisfy certain needs for empowerment and recognition that are at least as important as the substantive issue under discussion.[13]

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[12] For a critique of *The Promise of Mediation*, see C. Menkel-Meadow, "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices," 11 Negotiation Journal 217 (1995). For a critique of the concept of empowerment as a feature of mediation, see S. Cobb, "Empowerment and Mediation: A Narrative Perspective," 9 Negotiation Journal 245 (1993).

[13] Another important and useful perspective on the psycho-social dimensions of negotiation comes from the recently published book by Doug Stone, Bruce Patton & Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (1999), in which the authors explore (among other things) the ways in which an individual's self-image and self-esteem are impacted by the process of negotiation.

The study of mediation and communication theory provides a set of tools for such empowerment and recognition, such as active listening and reframing. However, these tools cannot be employed in a mechanical way. Empathetic listening is as much a discipline of heart as of mind, just as thoughtful reframing requires intuition as much as intellect.

In a negotiation, these techniques may be valuable in and of themselves, because they demonstrate genuine concern, and that may be one of the other party's underlying objectives. However, they may also provide a broader window on the parties' respective interests -- i.e., as part of a conversation in which each negotiator understands more fully the wide range of interests that the other party brings to the table.

B. CONFLICT AS OPPORTUNITY

Mediators are trained to think of conflict not as a social evil to be eradicated but rather as an inevitable part of life in any society. Conflict, from this standpoint, may often be a healthy expression of disagreement -- the soil from which a democratic and pluralistic society gains its strength. Indeed, mediators often invoke the image, first popularized in an inaugural address by President John F. Kennedy, of the Chinese character for "crisis" which contains within it the character meaning "danger" and the character for "opportunity."

The opportunity that exists in crisis also exists in every negotiation: the opportunity to maximize joint gains and distribute those gains fairly, to overcome barriers to communication, to develop a deeper understanding of the other person's needs and interests, and to create a setting in which people feel empowered rather than stifled.

VI. Conclusion

Learning how to negotiate successfully depends on how one defines success. Twenty years ago, successful negotiation was defined primarily as the effective deployment of techniques designed to accomplish the negotiator's objectives by persuasion or manipulation. Success was measured solely by the extent to which the negotiator's objectives were met.

With the advent of principled, interest-based negotiation came a broader focus on welfare maximization: the successful negotiator looks for opportunities to make both sides better off, instead of seeing negotiation as a competitive, zero-sum exercise. Because of the risk that cooperative, interest-based negotiators would be vulnerable to negotiators who sought only to claim value (rather than participate in creating it), negotiation theorists developed the technique of tit-for-tat bargaining. To make effective use of this technique, however, negotiators must communicate their intentions and perspectives. Mediation offers an opportunity to do that more effectively, especially in those settings where cognitive or other barriers to effective communication exist. Mediation also shows, by example, the ways in which the deeper underlying interests of negotiators -- for empowerment and recognition -- may be met in the process of negotiation. Meeting those needs, while at the same time pursuing the welfare maximization goals attainable through principled, interest-based negotiation, may be seen as a worthwhile definition of successful negotiation.

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NEGOTIABILITY APPEALS

A Guide to the FLRA Negotiability Appeals Process

This information is intended to be used as a general guide to the negotiability appeals regulations of the Federal Labor Relations Authority (FLRA or Authority). If you want more information, you should read the regulations themselves, which are found in title 5 of the Code of Federal Regulations, starting with section 2424.1. The regulations are binding, so if you have any question about something after you read this guide, you should double-check the matter by taking a look at the regulations. You can also get information about the Authority's procedures by calling the Case Control Office at 202-482-6540.

The negotiability appeals process has been set up to resolve disagreements between the union and the agency about whether proposed or negotiated contract language is legal or negotiable. Other procedures may be more appropriate for other kinds of disputes. For example, if the agency states that it will not bargain over a particular subject matter, regardless of the wording of the proposal, the dispute may be handled through unfair labor practice (ULP) procedures. If the agency simply disagrees with the proposal, and doesn't question the legality of it, the dispute may be better addressed through mediation or the Federal Service Impasses Panel (FSIP). Sometimes the agency will raise more than one objection to a proposal, and the union will need to evaluate the procedural options to decide where it wants to seek a resolution.

WHEN THE UNION MUST FILE A PETITION FOR REVIEW ABOUT A PROPOSAL

When a union puts forward a contract proposal for bargaining, and the agency says it's non-negotiable, the union can start the appeal process by filing a petition for review with the FLRA's Case Control Office.

There are several things that the parties should know about what can prompt the proper filing of a negotiability appeal:

if the union writes to the agency and asks for what's called an "allegation of non-negotiability," and the agency responds with the allegation in writing, the union has 15 days from the date of service of the allegation to file the petition at the FLRA headquarters in Washington, D.C.;

if the union writes to the agency and asks for an allegation of non-negotiability, and the agency does not respond within ten days of receipt of the union's request, the union may do one of two things:

(1) ignore the agency's silence and not file a petition, or

(2) file the petition at any time after the agency's written response should have been given;

if the agency states that something is non-negotiable, without being asked for its opinion by the union in writing, the union may file its petition, but it does not have to - it may keep on negotiating, since it did not ask for an allegation of non-negotiability;

if the agency only says the proposal is non-negotiable orally, and not in writing, the union does not have to file its petition - it may keep on negotiating, since the allegation of non-negotiability must be in writing before a petition can be filed.

FILING A PETITION WHEN A PROVISION HAS BEEN DISAPPROVED

Under limited circumstances, a negotiability appeal may also be filed after the local union and agency have agreed on the contract language that they expect will be included in the collective bargaining agreement. Under federal labor law, agreed upon contract language has to be reviewed by the agency head, who determines whether in his or her opinion the agreed upon language is legal. If the agency head views the negotiated provisions as illegal, he or she will issue a letter that disapproves the questioned contract provisions. The union must file a petition for review within 15 days of service of the disapproval letter in order to appeal the agency head's determination.

HOW THE UNION FILES ITS PETITION AND WHAT MUST BE INCLUDED

The union may file its petition in one of two ways. It may (1) use a form that is provided by the Authority's Case Control Office or from its website, www.flra.gov, or (2) use plain paper, and give the same information that the form requests. Although the union does not have to use the form, it may be easier to do so, and will remind the union to give all the needed information. If the union doesn't give all the information that is needed, it's appeal may be dismissed. Even if the union chooses to use plain paper, the form can serve as a useful guide.

Basically, in its petition, the union has to give the exact wording of the proposal or provision that has been declared non-negotiable, and it has to explain the meaning. If there are any special terms that would not be familiar to people who don't work at the agency, the union must explain the terms. Also, the union is required to explain how the proposal works and what impact it would have. The union must list any laws, regulations or cases that support its argument. The union should provide a copy of any materials that the Authority would not be able to get from the law library or other public source. The union should provide copies of agency regulations, orders or directives. If the union wants to divide the proposal or provision so that only those specific parts that are illegal are struck down, it may ask for "severance" of the parts that can stand alone. If the union does ask for severance, it must explain how the subparts work on their own. In addition, the petition must include the names, addresses, telephone numbers and fax numbers of the union and agency representatives.

The union must mail or deliver a copy of the petition to the agency head and the chief negotiator for the agency. The union should review the Authority's regulations to learn the acceptable methods for providing - or "serving" - the agency with documents.

AFTER THE PETITION IS FILED: THE POST-FILING CONFERENCE

After the petition is filed, the Authority will fax to the parties a notice of a date and time of a conference that is called a "post-filing conference." This conference will usually be set within ten days of receipt of the petition for review. The Authority sets up the conference immediately after the petition is filed, which is why the union must include in the petition the parties' names, phone and fax numbers.

Post-filing conferences will normally be held by telephone, so the notice of the post-filing conference will include a toll-free number and instructions on how to make the call. The parties must participate in the telephone conference. If the designated union or agency representative is not available, another person should be chosen to handle the call. Changes in the date and time of the conference will not be made with any frequency. In those unusual circumstances where a change is needed, the request should be made to the Case Control Office at least five calendar days prior to the scheduled conference. Whoever participates for the union and agency must be prepared to talk about the contract proposal or provision. This means that the union has to be able to explain everything in its petition, and the agency has to be able to explain why it declared the matter non-negotiable. If the agency contends that it does not have to bargain about the contract proposal, regardless of its specific wording, it may raise that at the conference.

The Authority representative will discuss the negotiability appeal in detail with the union and the agency during the post-filing conference. If the parties are interested in getting mediation or interest-based bargaining help from the Authority's alternative dispute resolution specialists, the case will be put on hold to give the parties time to get help from the Collaboration and Alternative Dispute Resolution (CADR) office of the FLRA. If the parties don't want to try alternative dispute resolution, the appeal process will proceed. The parties will be asked during the conference to provide any information that the Authority representative thinks is necessary or useful. The Authority representative will prepare a summary of the conference, send a copy to the parties, and file it in the official record.

AFTER THE POST-FILING CONFERENCE: THE AGENCY'S STATEMENT OF POSITION

After the post-filing conference is held, the agency files its statement of position. This must be filed within 30 days of the agency head's receipt of the union's petition for review, unless the Authority or its representative has granted an extension of time. The agency may use a pre-printed form provided by the Authority's Case Control Office, or it may use plain paper and provide the same information that is requested on the form. Again, using the form may be the best way to ensure that the agency provides all the information that is needed. If the agency doesn't provide everything that is required under the regulations, the Authority could issue a bargaining order or order the agency head to withdraw its disapproval.

The statement of position is designed to give the agency a chance to explain its reasons why the contract language - either a proposal or a provision - is illegal or outside the obligation to bargain.

The agency must state what it views as the meaning or impact of the contract language, if it disagrees with the union's statement as to meaning or impact. It is required to set out all of the reasons it has for stating that the contract language is non-negotiable, such as management rights or inconsistency with law or regulation. If the agency disagrees with the union's request for severance, or if it thinks severance is proper, it should give all the reasons for its position. The agency must mail or deliver its statement of position to the union representative.

THE UNION'S RESPONSE TO THE AGENCY'S STATEMENT OF POSITION

Within 15 days of receiving the agency's statement of position, the union must file a response. This may be done on a form or on plain paper. The union must give reasons why the agency's arguments are incorrect. If the agency claims that the proposal or provision violates management rights, the union is required to identify and explain any exceptions that apply, such as that the proposal or provision is an electively negotiable topic, a negotiable procedure or a negotiable appropriate arrangement. If the agency has made bargaining obligation claims, the union should respond to those. Essentially, the union should answer the agency's arguments. In addition, the union may ask for severance, if it has not already done so. The union must mail or deliver a copy of the response to the agency head and the agency's representative.

THE AGENCY'S REPLY

The agency may file a reply to the union's response, if the union has raised new arguments. For example, if the union says that the proposal or provision does not violate management rights because it is electively negotiable or is a procedure or appropriate arrangement, the agency may state why it disagrees with that. Similarly, if the union requests severance for the first time in its response, the agency may reply to that with its own arguments. The agency is not supposed to raise anything new, and should limit its reply to things that the union put in its response.

BARGAINING OBLIGATION DISPUTES

Sometimes an agency states that a proposal is non-negotiable even when it is legal. This is called a "bargaining obligation dispute," which occurs when the agency states that (1) there is "no obligation to bargain" because the proposed contract language is already covered by or included in an existing collective bargaining agreement; or (2) the union has waived its right to bargain; or (3) an agency-initiated change is too minor to require bargaining. An agency is asked to raise this kind of claim at the post-filing conference, but may wait to raise this assertion until filing its statement of position.

A bargaining obligation dispute can be processed in a couple of ways. A union may have filed a grievance or unfair labor practice charge against the agency for refusing to bargain. If it has done that, the Authority will dismiss the petition for review because the general question about the obligation to bargain will be decided in another way. As an alternative to filing a grievance or ULP, the union can ask the Authority to resolve the bargaining obligation dispute as a part of the negotiability appeal.

If the Authority agrees that there is an obligation to bargain, it will not order unfair labor practice type of remedies in a negotiability appeal. The Authority will inform the parties of its decision at the same time that it determines whether the proposal is negotiable or legal.

ADDITIONAL FACT-FINDING AND RESOLUTION OF THE CASE

After all the papers are filed, the Authority can resolve the case in a number of ways. If the papers give a complete picture, the Authority can simply make a decision based on the written materials. If it needs to, however, the Authority can ask for more materials, including answers to specific questions from the Authority's representative.

In addition, the Authority can refer the case to a fact-finder, such as an administrative law judge. If fact-finding procedures occur, both parties have to cooperate and respond to the orders and requests of the Authority and its representatives. If either party doesn't respond timely and fully, that party might have its arguments disregarded.

After all fact-finding is complete, the Authority will issue a decision. If the proposal is negotiable or there is a duty to bargain, the Authority will issue a decision and order the agency to bargain or to withdraw its agency head disapproval. If the proposal or provision is electively negotiable, the Authority will say so. If the proposal or provision is non-negotiable, or there is no duty to bargain, the Authority will dismiss the petition. Whatever the Authority's decision might say, the parties are obligated to obey Authority orders. If an agency does not follow the Authority's order to bargain within 60 days, the union can report non-compliance to the Regional Director in the area of the country where the agency is located.

APPEAL RIGHTS

If a party is aggrieved by the Authority's final order, it can file an appeal in a United States court of appeals. The appeal must be filed during the 60-day period beginning on the date on which the order was issued.

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UNFAIR LABOR PRACTICE PRIMER

The Federal Labor-Management Relations Statute sets up specific rights for agency employees, unions, and agency management. The law (5 U.S.C. 7116) prohibits specific actions by both agency management and the union. These prohibited actions are called Unfair Labor Practices (ULP's). While a grievance is a complaint alleging violation of the collective bargaining agreement, a ULP charge is an allegation of a violation of the law itself. Each of the FAA's labor agreements has a specific time limit for filing a grievance. A ULP charge must be filed within six (6) months from the date of the event. As an exception to the 6-month filing limit, charges can be accepted beyond this limit if the charging party can establish that it was unaware of the subject event(s) because of deliberate concealment of the part of the Charged Party.

ULP Charge

When an employee, union, or agency believes a ULP has been committed, a ULP charge may be filed with the appropriate Federal Labor Relations Authority (FLRA) Regional Office. Even though both an agency or an individual employee may file a ULP charge against the union, the procedures described in this section are those used in the most common ULP charge--one filed by the union against the agency. The charge must be filed on a standard form, which is supplied by the FLRA. The form asks for several items of information: a description of the facts or events on which the charge is based, the sections of the Statute violated, and the persons to contact to investigate the matter.

When the union files a ULP, they are responsible for sending a courtesy copy of the ULP charge to the facility/office they are filing against. Therefore, the person named as the agency contact in the ULP charge will receive a copy of the ULP charge, before anyone else in the agency. Sometimes the individual designated by the union as the agency contact, is unaware of the alleged violation or may not be involved at all in the alleged violation. Although you may be designated as the management official directly involved and actually named in the charge, the ULP charge is against the agency, not you as an individual Don't take it personally! When you receive the courtesy copy from the union, send it to ASO-16 and a copy to your operating division. No response is required at this time.

What happens when you receive the Official copy of the charge? As discussed above, many times the local union official will list the first-line supervisor as the contact point. When this occurs, the FLRA Regional Office sends correspondence directly to the designated contact point, along with an FLRA Form 75 (Notice of Designation of Representative). The FLRA region puts a case number on the charge and assigns it to an agent for investigation. The FLRA's Regional Office will issue a letter to the charged party asking the agency to develop a description of the facts and circumstances concerning the charge. This description should include the name, addresses, and telephone numbers of potential witnesses, as well as the agency's position with respect to the allegations contained in the charge.

It is not the responsibility of the first-line supervisor or manager at a facility/office to respond to the charge. No response should be made by facility/office management. If you are contacted by an agent from the FLRA, you should decline to discuss the charge unless a Labor Relations Specialist from ASO-16 is present.

When your facility/office receives the official ULP from the FLRA Regional Office, you should immediately send all the original correspondence to ASO-16, with a copy to your operating division. ASO-16 will designate a Labor Relations Specialist to the case. The ASO-16 specialist will request a written statement from the facility/office to develop the agency's position in response to the charge. The Labor Relations Specialist will work closely with facility/office management and the operating division to develop a response to the charge.

Investigation

In order to begin their investigation, the FLRA Regional Office may make direct contact with union officials and witnesses before receiving the agency's position. However, most likely, the Authority's Regional Office will contact the agency's designated representative to arrange for interview of union witnesses. Under current case law, investigative interviews with FLRA agents can be conducted on official time. This means the interviews can be conducted during the employee's normal work hours without any charge to leave. Remember, it is the agency's responsibility to schedule interviews at a convenient time which does not interfere with important work assignments. At times, these interviews may be conducted by telephone instead of a personal interview.

An important phase of the investigation process is the FLRA agent's interview with managers and supervisors. There is no legal or regulatory requirement for the agency to meet with the FLRA agent. However, we believe that by allowing the FLRA agent to interview managers and supervisors, the agency has an opportunity to present its best case. By accommodating this, we may head off a formal complaint, which always involves a significant amount of staff time. This approach has been successful in providing information and documentation to the Authority's Regional Office. As a result almost all charges filed by the unions in this region are dismissed. However, there are two simple rules which must always be followed.

A Labor Relations Specialist will serve as a representative for the supervisor or manager in any personal or telephone interview with an FLRA agent. Supervisors/Managers should never interview alone with the FLRA agent.

Do not provide a sworn statement or affidavit. It is our practice to permit FLRA agents to interview management witnesses and take notes. However, our managers and supervisors do not provide sworn statements or affidavits which may be used in a hearing to impeach a witness.

After the investigation, what can you expect? After the FLRA Regional Director's investigation of the charge, the Regional Director may take any of the following actions:

Approve a request to withdraw the charge. If the union submits a withdrawal request after the charge is filed, the withdrawal must be approved by the Regional Director. This situation may occur if, for example, based upon discussions with the field agent of the Regional Director, the charging party decides that its charge is procedurally defective, invalid, or unfounded. By voluntarily withdrawing a charge, no precedent is established. It is the FLRA's policy not to share the reasons for a voluntary withdrawal with the agency. When the union withdraws a charge, the FLRA's Regional Director issues a one sentence letter to both parties indicating that "the charge has been withdrawn". No reason or further explanation is provided.

Refuse to issue a complaint. The FLRA Regional Director may refuse to issue a complaint if he or she determines that the charge is procedurally defective, the charge is not supported by the evidence, the allegations do not constitute an unfair labor practice, or a satisfactory offer of settlement had been made. The Office of General Counsel of the FLRA has been criticized for litigating cases which appear to be trivial or moot, thereby wasting the time and resources of both the FLRA and the agencies and unions. As a result, the Office of General Counsel of the FLRA has established a procedural discretion policy in which specific criteria has been established and will be applied prior to dismissing a charge because its further processing does not effectuate the purposes and policies of the Statute. While the Office of General Counsel of the FLRA will dismiss charges of little significance, it is their intention to prosecute the remaining cases more vigorously, seeking new and more meaningful remedies. A dismissal usually occurs when the union refuses to withdraw a charge that the FLRA Regional Director has determined should not be prosecuted. The reasons for refusing to issue a complaint are outlined to all parties. The charging party may request a review by the FLRA General Counsel's of the Regional Director's decision not to issue a complaint.

Approve a written settlement agreement. The parties may informally resolve issues before the Regional Director issues a complaint. The Regional Director may approve such an agreement rather than continue to process the charge. If the charging party refuses to become a party to a settlement agreement offered by the respondent, the Regional Director may enter into the agreement with the respondent and refuse to issue a complaint. The Regional Director does this if he/she believes the offered settlement puts the federal labor-management relations policies into effect.

Issue a complaint. If it is determined that there is a reasonable basis for the allegations, the Regional Director issues a complaint to the respondent. A complaint is similar to the indictment you often hear about in criminal cases. By issuing a complaint, the FLRA's Regional Director is stating that it is his/her belief that there is enough evidence to prove there was a violation of the law. A ULP can be settled even after a complaint is issued. However, the probability of gaining concessions decreases as you get closer to the hearing.

Hearing

In the absence of a settlement after a complaint has been issued, the parties are directed to appear before an Administrative Law Judge (ALJ) for a hearing. This hearing will be in a courtroom-like atmosphere and a transcript of the proceedings is made by an official reporter. The General Counsel of the FLRA, usually represented by the regional FLRA attorney, is responsible for prosecuting the complaint. Sometimes the FLRA agent who investigated the charge serves as the prosecuting attorney, for the hearing. The burden of proof is on the FLRA General Counsel. That is, the General Counsel must prove by a preponderance of evidence that the allegations contained in the complaint are true. Both the respondent (agency) and the FLRA's General Counsel have the right to examine or cross-examine witnesses, present argument in support of their positions, and file briefs.

Decision

After the close of the hearing and the receipt of any briefs, the ALJ prepares a recommended decision and an order which contains findings of fact, conclusions, the reasons for the conclusions, and any necessary determinations on the facts. The recommended decision also includes the disposition of the case and any warranted remedial action. If neither side files an exception (appeal), the recommended decision becomes final.

Either party may appeal the ALJ's recommended decision to the three members of the FLRA. Most ALJ decisions are affirmed by the Authority. However, an ALJ's recommended decision may be modified or reversed by the Authority.

A final decision of the FLRA on an unfair labor practice complaint may be appealed to the U.S. Court of Appeals.

Remedies

If a violation is found, the ALJ or the Authority will require a notice be posted which orders the agency to "cease and desist" (stop) the activity that violates the law. Such notices are signed by a management official and are posted for 60 days in all places where notices are normally posted. A "Status Quo Ante" order may also be ordered. This occurs when the ALJ or the Authority determines that an agency made an improper change without bargaining with the union. This remedy requires the agency to put things back to the way they were before the improper change.

When an action by an agency resulted in an employee losing pay, benefits, or pay differentials, a "make whole" order may be issued which provides the employee with the pay or benefits which were lost by the agency's violation of the Statute. If the ULP violation was a result of the agency's refusal to bargain with the union, an order to negotiate in good faith on the matters or proposals involved could be issued.

Commonly Committed ULP's

The most commonly committed ULP's concern management's failure to bargain with the union concerning conditions of employment for bargaining unit employees. Examples of these types of violations:

Changing a personnel policy or procedures without first notifying the union and giving it a chance to negotiate.

Failure by management to afford the union an opportunity to bargain on the impact and method of implementing the management change, when exercising a management right under the Statute.

Change in a well-established past practice without bargaining with the union.

Other common ULP charges deal with failure or refusal of management officials to allow union representative to attend a formal discussion or investigative/Weingarten meeting; refusal to provide information which is necessary for the union to investigate or process a grievance; and assertions that agency management has discriminated against employees in taking various personnel actions based on union activities.

Avoiding a ULP

The easiest way to avoid committing a ULP is to understand your obligations under the law and union rights under the law. An important first in that process is to familiarize yourself with the contents of this booklet. You should also attempt to get all the labor relations training possible. Communication with your appropriate operating division's LR contact point is very beneficial. In ASO-16, we are always willing to discuss issues which might result in a ULP. Keep in touch with your Labor Relations experts.

Open communication with the union often helps to avoid ULP charges. This type of communication fosters settlement of disputes at the lowest level, often eliminating the filing of seemingly endless paperwork with the FLRA.

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PREPARING FOR ARBITRATION…

When Preparing for an Arbitration Hearing – What About Interviewing Bargaining Unit Members?

Two key phrases that an agency representative needs to be familiar with when contemplating interviewing bargaining unit members for an arbitration are "Formal Discussions," and "*Brookhaven* Warnings."

WHAT IS THE SIGNIFICANCE OF A "FORMAL DISCUSSION?"

When management is interviewing a bargaining unit employee in preparation for an arbitration hearing, the interview may be considered a "formal discussion" if the requirements of formality as set forth in FLRA case law exist. ***If the interview is considered a formal discussion, the union must be notified and provided an opportunity to be present during the employee's interview.*** *Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming*, 31 FLRA 541 (1988).

Where Does the Requirement to Notify the Union Regarding Formal Discussions Come From?

The FLMRS at 5 U.S.C. § 7114(a)(2)(A) states:

"An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment."

Holding a formal discussion without notifying the Union is therefore an unfair labor practice.

WHAT ARE THE INDICATORS OF A "FORMAL DISCUSSION?"

In determining whether or not a formal discussion was held, the FLRA looks to the "totality of the circumstances." *Dept. of Labor, Office of the Assistant Secretary for Admin. And Management, Chicago, Illinois*, 32 FLRA 465, 470 (1988).

Some of these "circumstances" that indicate a formal discussion has taken place include:

1. Whether the individual who held the discussion is a first-level supervisor or a more senior management official.
2. Whether any other management representatives attended;
3. Where the individual meeting took place (i.e. in the supervisor's office, in the break room, etc.);
4. The length of the meeting;
5. Was the meeting scheduled in advance, or was it informal or unplanned;
6. Was a formal agenda developed for the meeting;
7. Was attendance at the meeting mandatory for the bargaining unit member/members;
8. Were comments at the meeting formally recorded or transcribed, etc.

Bottom line: An interview may be a formal discussion if the requirements of formality are met. If the interview is a formal discussion, the union must be notified and provided an opportunity to be present during the employee'

What are "Brookhaven" Warnings?

Even if the Union is notified that an Agency representative is going to interview a bargaining unit employee for an upcoming arbitration, and a Union representative attends this interview, this does NOT mean that "anything goes" as far as the manner of questioning. What the Agency may consider an "interview" from the Union perspective may be considered an "interrogation." The interview of the bargaining unit member should be voluntary and non-coercive. *Brookhaven* warnings are designed to minimize the potentially coercive impact of an Agency interview with an employee. The warnings (or advisements) come from *Internal Revenue Service and Brookhaven Service Center and NTEU and NTEU Chapter 99*, 9 FLRA 930 (1982).

To insure that no coercion takes place in an interview, the following warning must be given prior to the interview:

1. **Inform an employee who is to be questioned of the purpose of the questioning**
2. **Assure the employee that no reprisal will take place if he or she refuses and obtains the employee's participation on a voluntary basis**
3. **Any questioning must take place in a context that is not coercive**
4. **Any questions must not exceed the legitimate scope of inquiry or otherwise interfere with an employee's statutory rights**

WHAT IF BROOKHAVEN WARNINGS WERE NOT GIVEN?

The failure to provide the *Brookhaven* warnings is not a *per se* ULP. The FLRA will determine whether the circumstances in which the interviews occur are coercive instead of simply determining whether the Brookhaven assurances were given. *Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming*, 31 FLRA 541 (1988). In one case the Air Force was held to have violated 5 U.S.C. section 7116(a)(1) by coercively questioning a union witness concerning matters known to be at issue in an upcoming arbitration hearing. *U.S. Department of the Air Force, Ogden Air Logistics Center, Hill AFB, Utah*, 36 FLRA 748 (1990). Bottom line: Providing *Brookhaven* warnings avoid the issue and is the proper way to proceed.

PREPARING FOR ARBITRATION – Techniques:

HOW SHOULD I CONDUCT RESEARCH FOR THE ARBITRATION?

Although more information is provided below regarding specific subject-matter arbitrations, here is some general guidance on conducting research:

a. Use technical representatives (i.e., labor specialist, personnelist, finance, etc.).
b. Review applicable provisions of collective bargaining agreement.
c. Review applicable laws, rules and regulations.
d. Review applicable FLRA case law.
e. Review published arbitration awards. Arbitration awards are published in services such as the following:
    1) Federal Labor Relations Reporter
    2) Labor Arbitration Reports (BNA)
    3) Labor Arbitration Awards (CCH)
    4) Government Employment Relations Report GERR (BNA)

HOW DO I KNOW WHAT THE EXACT ISSUE WILL BE AT THE ARBITRATION?

Most contracts require parties to submit issues to arbitrator in advance, although this is not always the case. If there are not provisions in the CBA regarding submitting a statement of the proposed issue in advance of the arbitration, then the arbitrator will ask for a proposed statement of the issue at the arbitration. This method sometimes has the disadvantage of causing confusion regarding what evidence and/or witnesses should be lined up in advance of the arbitration. However, by reviewing the grievance history and talking to the Union, it is usually possible to anticipate most relevant issues in advance.

Submitting the issue to the arbitrator defines the issue in dispute between the parties and helps ensure that the arbitrator limits his/her decision specifically to that issue. The agreed upon issue puts limits on the arbitrator's authority in the dispute. If the parties cannot agree on the issue, the arbitrator decides what issue(s) are before him/her based on the submissions of the parties. Although this should be obvious, attempt to frame the issue in a manner that is favorable to your client. Have a good knowledge of the grievance history - this should help narrow the issue.

WHAT ABOUT STIPULATIONS OF FACT?

Stipulations of fact can be used in arbitrations, and can help speed up the arbitration and focus the process on the actual matters in contention.

a. When to Use
   (1) The essence of a stipulation is that the parties agree as to essential fact(s).
   (2) Stipulation used as a substitute for presenting actual evidence.
   (3) Stipulation becomes evidence of issue agreed to.
   (4) Stipulation may be used to avoid bringing witnesses if there is no dispute as to the stipulated testimony.
   (5) Stipulation can be used to avoid lengthy production of evidence.
   (6) Stipulation can be used if you want to avoid calling a particular witness because of their demeanor, attitude, etc.

b. When Not To Use
   (1) If case involves credibility issues, a stipulation is not appropriate because the parties most likely will not agree on the stipulation.
   (2) Don't use stipulation if impact of witnesses themselves will be greater than evidence they testify to. Sometimes seeing a witness will lend more to a case than mere written words.

WHAT ABOUT SUBPOENAS FOR WITNESSES?

An arbitrator has no authority to issue subpoenas in a federal-sector arbitration. However, an arbitrator could make an "adverse inference" as to the testimony of a witness that either party refuses to make available.

WHAT ABOUT AN EXCHANGE OF WITNESS LISTS?

Check the applicable collective bargaining agreement. Many CBAs have procedures and time frames for exchanging witness lists. Even if no agreed upon procedure for the exchange of witness lists exists, it is advisable to give the Union as much notice as possible as to who the anticipated Agency witnesses will be. Also make a written request to the Union for their anticipated witnesses as soon as possible.

Both giving witness names and asking for a list of Union witnesses in writing may become important if notice and opportunity to prepare becomes an issue at the arbitration.

WHAT IS A PRE-ARBITRATION BRIEF?

A pre-arbitration brief is a device designed to orient the arbitrator about the arbitration to help the entire process proceed more efficiently. If used, the pre-arbitration brief should be served on both the arbitrator and the union. An example of a pre-arbitration brief is provided below. Note that includes the following information:

a. The addresses and phone numbers of the Agency Representative, Agency Technical Advisor, and the Union President
b. The date and location of the arbitration.
c. Billing information.
d. Notice that the agency reserves the right to approve or disapprove publication of the arbitration award. (Several commercial services publish selected arbitral decisions.)
e. To whom the bill should be sent.
f. Copies of proposed Agency exhibits.
g. A statement of any potential issue of arbitrability (which will be discussed in more detail below).
h. A statement of the issue. A statement of the issue will arise in virtually every arbitration. This is simply a statement of what question or issue the arbitrator has been hired to answer. Often, and not surprisingly, the Agency and the Union disagree on how the issue should be stated.
i. Background and history of the grievance. This should be a brief statement of what the arbitration is about, and the events that lead up to the arbitration. This is meant merely to orient the arbitrator, and is not designed as an opening statement.
j. Please note that the use of a pre-arbitration brief is a matter of preference. It is not necessarily either expected or required - however, as always check your CBA, which may require or prohibit the submission of a pre-arbitration brief.

THE ARBITRATION HEARING

WHAT KIND OF SEQUENCE OF EVENTS CAN I EXPECT IN AN ARBITRATION?

Unlike in an Air Force court-martial, there is no "script" or other guide that dictates the exact sequence of events in every arbitration. Arbitrators have individual preferences, and procedures do vary. However, the typical order of an arbitration is as follows:

a. Preliminary matters.
    (1) submission of issues;
    (2) motion for sequestration of witnesses (this is often done simply by agreement of the parties per past practice);
    (3) requests for admission of joint exhibits;
    (4) requests for admission of stipulations;
    (5) status of settlement discussions, if any.
b. Opening statement(s). Neither party has an obligation to give an opening statement. However, this is your first opportunity to address the arbitrator and make a first impression concerning the facts of your case without objection from anyone.

c. Order of presentation - who goes first?
   (1) If the Union filed the grievance over a non-disciplinary action, the Union presents its evidence first.
   (2) If the Union filed the grievance over disciplinary action, management presents its evidence as to the basis of discipline first.
   (3) If the Management filed the grievance, management presents its evidence first.

d. Direct and cross examination of moving party's witnesses

e. Opposing side presents evidence. Direct and cross examination of opposing party's witnesses.

f. Rebuttal evidence.

g. Closing arguments. At the conclusion of the presentation of all of the evidence, the arbitrator may ask if there will be oral arguments made now or the submission of written briefs within an agreed upon number of days after the conclusion of the arbitration or both. The parties may agree not to submit written briefs if the parties desire a more quickly rendered arbitral decision.

h. Arbitrator's Decision. Consistent with time limits established in the collective bargaining agreement, the arbitrator issues a final and binding decision. Exceptions or appeals of this decision may be made under certain circumstances.

ARE THE RULES OF EVIDENCE APPLICABLE?

Rules of evidence? No way, again unless otherwise stated under the CBA, which would be highly unlikely. The only observed rule of evidence is that of *relevance*. One of the recognized benefits of arbitration is the therapeutic value of allowing the facts and circumstances of the dispute to be aired, and many times the Union is not represented by an attorney, so strict rules of relevance are deemed as being too restrictive. Hearsay is admitted for "what it is worth." When hearsay is used, be prepared to offer the arbitrator some reasons why he or she should deem it reliable.

WHAT ABOUT "NEW" EVIDENCE NOT DISCLOSED DURING THE COURSE OF THE GRIEVANCE PROCESS?

Evidence that was not disclosed or used during the course of the grievance process and is just being disclosed for the first time during the arbitration *might* not be allowed in or considered by an arbitrator even without the presence of bad faith, but this is the minority position. More typically, this type of evidence *is* allowed in, with delays granted to gather evidence in rebuttal.

WHAT ABOUT BURDENS OF PROOF?

Unless a specific standard of proof or review is required by law or the parties' collective bargaining agreement, an arbitrator has the authority to establish whatever standard of proof that he or she considers appropriate.

SPECIFIC ARBITRATION ISSUES

WHAT STANDARDS ARE USED FOR INTERPRETING CONTRACT LANGUAGE?

Arbitrations concerning what is meant by a specific provision of a labor agreement are common. Arbitrators, in sorting through what is meant intended by the contract, and in attempting to divine what the parties meant when they signed the agreement, are guided by certain principles. Understanding them helps the attorney representative frame the contract language issue in terms that will present the Agency's position in the best possible light.

AMBIGUITY - There is no need for interpretation unless the contract is ambiguous.

Ambiguous - "plausible contentions may be made for conflicting interpretations."

Ambiguity is caused by:

- impossibility of foreseeing all questions that may arise.
- variation in meaning of words.
- failure to have a meeting of the minds.
- tunnel vision.

INTENT - Arbitrators will ascertain the "intent" of the parties.

CLEAR AND AMBIGUOUS LANGUAGE - Even though the parties may disagree as to its meaning, if the arbitrator finds the language to be unambiguous, he/she will enforce its clear meaning, regardless of inequities that may result.

LAWFUL INTERPRETATION - Whenever two interpretations are possible, one lawful and the other unlawful, the lawful interpretation will be used.

NORMAL AND TECHNICAL USAGE - In the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern.

AGREEMENT CONSTRUED AS A WHOLE - The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole.

An interpretation, which tends to nullify or render meaningless any part of the contract is avoided.

AVOIDANCE OF HARSH, ABSURD, OR NONSENSICAL RESULTS - When one interpretation of an ambiguous contract would lead to harsh, absurd or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used.

TO EXPRESS ONE THING IS TO EXCLUDE ANOTHER - To expressly include one or more of a class is taken to exclude all others. To state certain exceptions indicates there are no other exceptions. To expressly include some guarantees is to exclude other guarantees.

DOCTRINE OF EJUSDEM GENERIS - Where general words follow an enumeration of specific terms, the general words will be interpreted to include or cover only things of the same general nature or class of those enumerated.
Example of Ejusdem Generis –

Example: A clause providing that seniority shall govern in all cases of layoff, transfer, "or other adjustment of personnel" should not be construed to require allocation of overtime work on the basis of seniority.

SPECIFIC V. GENERAL LANGUAGE - When there is a conflict between specific language and general language, the specific language will govern.

Example: In the question of whether the Company was obligated to furnish rain clothes to employees, where such had not been furnished or required in the past, the arbitrator was faced with the following contract language:

"The Company will continue to make reasonable provisions for the safety and health of its employees."

and

"Wearing apparel and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing, or as such practices may be improved from time to time by the Company."

In this case, the second clause was more specific; therefore, the arbitrator ruled that furnishing rain clothing was not required. However, had the first clause stood alone, he would have been required to determine whether the furnishing of rain clothes was reasonably necessary for the safety and health of the employees.

CONSTRUCTION IN LIGHT OF CONTEXT - Definite meaning may be given to ambiguous or doubtful words by construing them in light of the context. The meaning of words may be controlled by those with which they are associated.

AVOIDANCE OF FORFEITURE - A party claiming a forfeiture or penalty under a written instrument has the burden of providing that such is the unmistakable intention of the parties to the document.

PRECONTRACT NEGOTIATIONS - The arbitrator may consider bargaining history to determine meaning of contract language. This may include recordings, minutes of meetings, stenographic record, and oral testimony.

If one party proposes ambiguous language, and the other party is thus misled as to the first party's intentions, the arbitrator may accept the second party's understanding.

If a party attempts, but fails, to include a specific provision in the agreement, many arbitrators will hesitate to read such provision into the agreement through the process of interpretation.

NO CONSIDERATION TO COMPROMISE OFFERS - No consideration will be given to compromise offers, or to concessions offered by one party and rejected by the other, during efforts to reach a settlement prior to arbitration.

EXPERIENCE AND TRAINING OF NEGOTIATORS - If the negotiators were laymen untrained in the precise use of words, and if the contract bears evidence of a lack of precision, the arbitrator may refuse to apply a strict construction. A less liberal approach is likely to be taken if the arbitrator knows that the negotiators were capable and shrewd, or were sophisticated veterans of negotiations.

CUSTOM AND PAST PRACTICE - It is well recognized that the contractual relationship between the parties normally consists of more than one written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties, and where they are of long standing and were not changed during contract negotiations.

INTERPRETATION AGAINST PARTY SELECTING THE LANGUAGE - Any ambiguity not removed by any other rule of interpretation may be removed by construing the ambiguous language against the party who proposed it. However, it has been held that ambiguous language need not be interpreted against the party who proposed it, where there is no showing that the other party was misled.

REASON AND EQUITY - Arbitrators strive, where possible, to give ambiguous language a construction which is reasonable and equitable to both parties, rather than one which would give one party an unfair and unreasonable advantage. Arbitrators tend to "look at the language in the light of experience, and choose that course which does the least violence to the judgment of a reasonable man."

POST-ARBITRATION MATTERS

WHAT IS AN ARBITRATION BRIEF?

An arbitration brief is a written document submitted to the arbitrator after the conclusion of the arbitration hearing that is used either as a substitute for a closing argument at the hearing, or a more detailed statement of the agency's case complimenting a closing argument. There is no universally accepted form for an arbitration brief, but a typical arbitration brief includes a fact section, and a law and argument section. The testimony elicited at the hearing, and the evidence previously submitted are drawn together in this document along with the applicable law and/or provisions of the applicable collective bargaining agreement so that the arbitrator clearly understands the agency's position in the arbitration.

THE ARBITRATOR RULED AGAINST THE AGENCY. CAN WE APPEAL? AND TO WHOM?

If the arbitration concludes with an arbitral award adverse to the Air Force, the question of appealing the decision inevitably will arise. The first question that needs to be answered is essentially what forum or agency has subject matter jurisdiction to hear the appeal. Depending on the facts and circumstances of the individual arbitration an appeal of the arbitral award might be filed with the Federal Labor Relations Authority, the Merit Systems Protection Board (in rare instances for National Guard cases), the Equal Employment Opportunity Commission, or in federal courts. This area of the law may become quite complicated depending on the particular case in question. Every possible nuance of this area of the law is impossible to cover in a handbook such as this. If consideration is being given to filing an appeal or exceptions, please remember that the attorneys and specialists at the National Guard Bureau are available to answer your questions regarding appeals and exceptions to administrative agencies and in the federal courts.

I&I BARGAINING ADVANCED TOPICS

Impact and Implementation (I&I) Bargaining Q&A and Primer
(from the 2003 SOLER Conference)

I&I Q & A Categories:

1. **Changes that require bargaining.**
2. **Advance notice requirements.**
3. **Requests to bargain.**
4. **Impasses in the bargaining process.**
5. **Advanced I&I issues.**

CHANGES

Changes Question 1
Agencies are not required to negotiate on the impact and implementation of a change if it involves the exercise of a management right under Section 7106 (a).
Changes Answer 1
The correct answer is FALSE.

Agencies are required to bargain on the impact and implementation of changes that involve the exercise of Section 7106 (a) management rights.

See 5 USC 7106(b)(2) and (3), and *Army Adjutant General Publications Center, St. Louis*, 35 FLRA 631.

Changes Question 2
The Statute does not actually include the term "impact and implementation" bargaining.
Changes Answer 2
The correct answer is TRUE.

See 5 USC 7106(b)(2) and (3), which refer to bargaining on "procedures and arrangements," but do not mention "impact and implementation" bargaining.

Changes Question 3
An agency is legally entitled to refuse to bargain over a change resulting from the exercise of a Section 7106(a) right if the impact of the change is *de minimis.*
Changes Answer 3
The correct answer is TRUE.

Note, however, that surprisingly minor changes have been deemed more than *de minimis* by the FLRA. See *SSA*, 24 FLRA 403.

Changes Question 4
A management-initiated change that will affect only one employee is automatically considered *de minimis* by the FLRA and courts.
Changes Answer 4
The correct answer is FALSE.

Several factors are considered in determining whether a change is *de minimis*.

In some cases a change affecting only one employee has been deemed to be more than *de minimis*. See *VA Medical Center, Phoenix*, 47 FLRA 419.

Changes Question 5
A union would be entitled to bargain on a new policy that would require first-level supervisors to rotate every six months, thereby placing bargaining unit employees under a different supervisor every 6 months.
Changes Answer 5
The correct answer is FALSE.

Bargaining on conditions of employment for positions outside the unit (e.g., supervisory) is permissive.

Nor is there a direct impact on the COE of bargaining unit employees.

See *Defense Contract Audit Agency, Central Region*, 47 FLRA 512.

Changes Question 6
An agency is not required to bargain on I&I proposals that would have an impact on persons outside the bargaining unit.
Changes Answer 6
The correct answer is FALSE.

Agencies may be required to bargain on proposals that impact upon non-unit employees if the matter "vitally affects" the COE of bargaining unit employees.

See *Library of Congress*, 53 FLRA 1334 .

Changes Question 7
Terminating an employee's use of a government-owned vehicle (GOV) when she voluntarily moves to a position in which GOVs are not provided would constitute a change in conditions of employment.
Changes Answer 7
The correct answer is FALSE.

The voluntary movement of an employee to a position in which working conditions were different (i.e. no GOV provided) *did not* constitute a change in conditions of employment.

See *OSHA,* 58 FLRA No. 55 .

Changes Question 8
An agency that is seriously considering a major reorganization that could result in a relocation of part of its workforce would be required to bargain upon receiving union proposals designed to mitigate the impact of the reorganization.
Changes Answer 8
The correct answer is FALSE.

Agencies are not required to provide notice or to engage in I&I bargaining *before* reaching a final decision to implement a change affecting conditions of employment.

See *SSA, Boston*, 47 FLRA 322 .

Changes Question 9
If a change does not involve the exercise of a Section 7106 (a) right, agencies are required to negotiate upon request even if the impact is less than *de minimis*.
Changes Answer 9
The correct answer is FALSE.

The *de minimis* standard is applicable if a change involves a matter or decision that is *substantively* open to negotiation.

59 FLRA 118 (2004).

Changes Question 10
An agency that wants to terminate a long-standing practice of allowing unit employees to hunt on agency-owned land would be required to bargain the impact of the change.
Changes Answer 10
The correct answer is FALSE.

There is no obligation to bargain the impact of a change that does not alter or affect a condition of employment of bargaining unit employees.

See *Vandenburg AFB*, 7 FLRA 123.

<u>Key Points re: Changes</u>
1. Bargaining obligation requires:
    -actual change
    -affecting COE
    -applicable to unit employees
    -more than *de minimis* impact

2. Not every change requires bargaining.

3. Unicorns are seen more often than d*e minimis* changes.

NOTICE:

Notice Question 1
The Statute requires agencies to provide reasonable advanced notice of intended changes that will affect the working conditions of unit employees.
Notice Answer 1
The correct answer is TRUE.

Agencies must provide the exclusive representative an opportunity to determine whether it wishes to bargain on an intended change.

Doing so requires reasonable advanced notice. See *Army Corps of Engineers, Memphis*, 53 FLRA 79.

Notice Question 2
"Reasonable" advance notice has been ruled to mean a minimum notice period of 30 calendar days, unless the labor agreement provides otherwise.
Notice Answer 2
The correct answer is FALSE.

The FLRA has ruled that the amount of advance notice it considers "reasonable" depends on a variety of factors, including the significance or extent of the change.

See *Customs Service, Region I*, 16 FLRA 654.

Notice Question 3
Agencies are required to provide notice in advance of an intended change if there is a "reasonably foreseeable" impact on conditions of employment of unit employees.
Notice Answer 3
The correct answer is TRUE.

Agencies are required to provide advance notice if an intended change is likely to create a "reasonably foreseeable" impact on the conditions of employment of unit employees.

See *Customs Service*, 29 FLRA 891.

Notice Question 4
Written notice to a local union president informing her that the agency may terminate the second shift within 30 days if the agency's budget is not supplemented would constitute reasonable advance notice.
Notice Answer 4
The correct answer is FALSE.

The announcement of an event that might or might not occur does not constitute reasonable advance notice.

See *IRS*, 10 FLRA 326, and *Ogden Air Logistics Center*, 41 FLRA 690.

Notice Question 5
A written request for the union's comments regarding an intended reorganization within 30 days would constitute reasonable advance notice.
Notice Answer 5
The correct answer is FALSE.

A request for mere "comments," carrying with it the implication that no bargaining is necessary or likely to take place, does not fulfill the notice requirement.

See *Philadelphia Naval Shipyard*, 18 FLRA 902.

Notice Question 6
Notice of intended changes that may impact conditions of employment must be provided to a union in written format to constitute advanced notice.
Notice Answer 6
The correct answer is FALSE.

The Statute does not require that notice be provided in any particular format.

See *Dept. of Air Force*, 4 FLRA 469.

Notice Question 7
An agency would be required to provide advance notice of its intent to no longer allow a unit employee to use official time to represent employees in another bargaining unit.
Notice Answer 7
The correct answer is FALSE.

There is no obligation to provide advance notice of a change that does not affect the conditions of employment of employees within the bargaining unit.

See *Port Hueneme*, 14 FLRA 360.

Notice Question 8
Providing notice to the national office of a union regarding a change that will primarily impact a field component would not meet the advance notification requirement in the Statute.
Notice Answer 8
The correct answer is FALSE.

The obligation to provide advance notice of an intended change exists at the level of recognition, not the level of implementation.

See *SSA*, 18 FLRA 73.

Notice Question 9
Advance notice is not adequate if a union credibly contends that it remained in a state of doubt or confusion as to the agency's intentions.
Notice Answer 9
The correct answer is FALSE.

The Statute merely requires reasonably clear notice of its intent, not the elimination of whatever confusion may fog the minds of union reps .

See *Customs Service, Port of New York*, 57 FLRA 718.

Notice Question 10
In order to meet the requirement of reasonable specificity, an advance notice of intended changes must include the intended date of implementation.
Notice Answer 10
The correct answer is TRUE.

A key component of specificity is a clear indication of when (i.e., the date) the agency intends to implement a change.

See *Customs Service, Port of New York*, 57 FLRA 718, and IRS, 10 FLRA 326.

Key Points re: Notice
1. Notification of change requires:
    -reasonable lead time
    -delivery to appropriate level
    -specificity
2. Notice must be provided when impact on COE is "reasonably foreseeable."
3. Notice is not adequate if it indicates that bargaining would be futile.

REQUEST:

Request Question 1
Upon notification of an intended change that may impact upon conditions of employment a union is entitled to request bargaining.
Request Answer 1
The correct answer is TRUE.

A union is entitled to raise proposals designed to deal with the impact and implementation of changes involving the exercise of a management right.
See *Social Security Administration*, 18 FLRA 437.

Request Question 2
In responding to a management notice of intended change, a union is required to specify whether it intends to bargain on a) the substance of the change, b) the impact and implementation of the change, or c) both.
Request Answer 2
The correct answer is FALSE.

A union merely needs to indicate that it wishes to bargain.
It does not have to specify whether it wishes to bargain on the substance of a decision, its impact and implementation, or both.
See *Bureau of Indian Affairs, Indian High School*, 37 FLRA 972.

Request Question 3
Failure to request bargaining in response to notice of an intended change can result in a waiver of a union's statutory right to bargain.
Request Answer 3
The correct answer is TRUE.

Failure to respond to reasonable advance notice of an intended change can result in a waiver of the right to bargain.

See *Customs Service, Region I*, 16 FLRA 654, and *Bureau of Engraving and Printing*, 44 FLRA 575.

Request Question 4
A union's failure to request bargaining in response to changes affecting conditions of employment can result in a waiver of its right to bargain on similar changes in the future.
Request Answer 4
The correct answer is FALSE.

A union's failure to exercise its statutory right to bargain in one instance does not create a waiver of its right to bargain in similar situations that may arise in the future.

See *IRS*, 27 FLRA 664.

Request Question 5
A request for information related to the announcement of an intended change must be treated as equivalent to a request to bargain.

Request Answer 5
The correct answer is TRUE.

A union may appropriately respond to the announcement of an intended change by requesting bargaining or by requesting additional information.

See *IRS, Kansas City*, 18 FLRA 693. change.

Request Question 6
An agency is not required to bargain in response to a request to negotiate that does not come from the level of exclusive recognition.
Request Answer 6
The correct answer is TRUE.

An agency is only required to respond to those requests to bargain which originate at the level of recognition.

See *INS*, 16 FLRA 80, and *Hill AFB*, 39 FLRA 409.

Request Question 7
Even if a union does not respond to a notice of intended change until the day before the implementation date, the agency is still required to postpone the change until negotiations can be completed.
Request Answer 7
The correct answer is FALSE.

Failure to respond to reasonable advance notice of an intended change until the 11th hour can and usually does result in a waiver of the right to bargain.
See *Customs Service, Region I*, 16 FLRA 654, and *Bureau of Engraving and Printing*, 44 FLRA 575.

Request Question 8
An agency may require that unions provide written proposals in order to constitute a valid request to bargain.
Request Answer 8
The correct answer is FALSE.

The Statute does not require that bargaining requests be provided in any particular format (unless stated in the contract). See *EPA*, 16 FLRA 602.

Request Question 9
If a union identifies negotiable proposals that it intends to discuss, but does not follow-up by seeking negotiations before the implementation date, the agency is free to implement the change.
Request Answer 9
The correct answer is TRUE.

Failure to carry through by actively seeking to negotiate can result in a waiver of the right to bargain. See *Social Security Administration*, 18 FLRA 437.

Request Question 10
A union has the right to insist that an agency negotiate ground rules for I&I bargaining before beginning negotiations regarding the change itself.
Request Answer 10
The correct answer is TRUE.

Either party is entitled to negotiate ground rules for the conduct of I&I bargaining, unless such ground rules are already established in the labor agreement.
See *Environmental Protection Agency*, 16 FLRA 602.

Key Points re: Request

1. Requests to bargain can consist of:
   - -proposals
   - -request to meet
   - -request for information
2. Union must respond to notification:
   - -in a timely manner
   - -with negotiable proposals
   - -at the level of recognition
   - -make an actual effort to negotiate

IMPASSE:

Impasse Question 1
If an agency declares impasse following good faith I&I negotiations, it can implement the changes it had announced by giving reasonable notice of its intention to do so.
Impasse Answer 1
The correct answer is TRUE.

An agency can announce its intention to implement intended changes upon impasse.

If the union does not seek FSIP assistance during the notice period, the agency may implement as planned.

See *Naval Ordnance Station, Louisville*, 17 FLRA 896.

Impasse Question 2
If a union seeks the assistance of the FSIP, an agency is required to postpone implementation of the intended changes.
Impasse Answer 2
The correct answer is TRUE.

In most cases an agency has to maintain the *status quo* to the extent possible until the FSIP disposes of the matter.

See *HUD, Kansas City Region*, 23 FLRA 435. See also *Bureau of Immigration Appeals*, 54 FLRA 454, and *INS*, 55 FLRA 892.

Impasse Question 3
If an agency makes changes despite the union timely seeking FSIP assistance, the change will not be deemed a ULP if the FSIP ultimately declines to take jurisdiction over the matter.
Impasse Answer 3
The correct answer is FALSE.

Whether the FSIP ultimately accepts or declines jurisdiction over a matter is irrelevant in deciding whether the agency's implementation was a ULP.

See *SSA*, 44 FLRA 870.

Impasse Question 4
Agencies are required to provide a minimum of five (5) working days notice of intent to implement a change following the declaration of an impasse.
Impasse Answer 4
The correct answer is FALSE.

The Statute does not prescribe a specific amount of advanced notice.

It must be sufficient to allow the union an opportunity to seek FSIP assistance.

See *Customs Service*, 16 FLRA 198, and *Luke AFB*, 36 FLRA 289.
Impasse Question 5
If a union fails to seek assistance from the FSIP after an agency declares impasse and announces its intention to implement, it waives its right to bargain.
Impasse Answer 5
The correct answer is TRUE.

Failure to timely seek Panel assistance after an agency's notice of intention to implement following impasse constitutes a waiver by inaction.

See *Naval Ordnance Station, Louisville*, 17 FLRA 896.

Impasse Question 6
If a union fails to notify the agency in writing before the announced implementation date that it has sought FSIP assistance, the agency can implement without committing a ULP.
Impasse Answer 6
The correct answer is TRUE.

A union is required not only to seek FSIP assistance before implementation, but also to serve written notice of doing so on the agency.

See *Scott AFB*, 33 FLRA 532, and *EEOC*, 48 FLRA 306.

Impasse Question 7
Written notification to the agency that a union intends to seek assistance from the FSIP constitutes notice, and normally requires the agency to maintain the *status quo*.
Impasse Answer 7
The correct answer is FALSE.

A union is required not merely to state an intent to seek FSIP assistance, but to actually do so in a timely manner.

See *Scott AFB*, 33 FLRA 532 and *VA, Philadelphia*, 52 FLRA 1429.

Impasse Question 8
An agency is legally entitled to implement an intended change even after a request for FSIP assistance if it first provides a written offer to bargain post implementation.
Impasse Answer 8
The correct answer is FALSE.

Merely offering to bargain after implementing a change does not exempt an agency from the requirement to maintain the *status quo*.

See *VA Medical Center, Decatur*, 46 FLRA 339.

Impasse Question 9
The Statute requires agencies to maintain the *status quo* after a union timely seeks FSIP assistance, regardless of whether the pending proposals are ultimately determined to be negotiable.
Impasse Answer 9
The correct answer is FALSE.

An agency is not required to postpone implementation of an intended change if there are no negotiable proposals at impasse.

See *IRS, Atlanta*, 18 FLRA 731.

Impasse Question 10
An agency is not required to maintain the *status quo* after a union has sought FSIP assistance if failure to implement the change would seriously impede the operations of the agency.
Impasse Answer 10
The correct answer is TRUE.

Agencies are not required to maintain the *status quo* if a change is necessary in response to an emergency or to preserve the necessary functioning of the agency.

See *INS*, 55 FLRA 892, *Bureau of Alcohol, Tobacco and Firearms*, 18 FLRA 466, and *Customs Service, San Ysidro*, 29 FLRA 307.

<u>Key Points re: Impasse</u>
1. Declaration of impasse:
    -clear statement
    -advance notice of intent to implement

2. Request for FSIP assistance requires:
    -written request to Panel
    -written notice to agency

3. Maintain status quo unless:
    -no negotiable proposals
    -necessary functioning/emergency

ADVANCED ISSUES:

Advanced Issues Question 1
An agency is not required to bargain on an I&I proposal that would require it to indefinitely postpone the exercise of a statutory management right.
Advanced Issues Answer 1
The correct answer is TRUE.

An agency is not required to bargain on proposals that would require it to indefinitely postpone the exercise of a statutory management right.

See *Customs v. FLRA*, 854 F.2d 1414 (D.C. Cir. 1988); *Bureau of Alcohol, Tobacco and Firearms*, 857 F.2d 819 (D.C. Cir. 1988).

Advanced Issues Question 2
An agency is required to bargain regarding the impact of an intended change regardless of whether the matter is addressed by provisions in a current labor agreement.
Advanced Issues Answer 2
The correct answer is FALSE.

Agencies are not required to bargain on matters that are already "covered by" the provisions of a labor agreement.

See *SSA*, 47 FLRA 1004.

Advanced Issues Question 3
An agency is not required to bargain on otherwise negotiable proposals that are not directly related to the proposed changes.
Advanced Issues Answer 3
The correct answer is TRUE.

An agency is not required to bargain on proposals that are not reasonably related to the intended change that triggers the bargaining obligation.

See *FLRA v. DOJ*, 994 F.2d 868 (D.C. Cir. 1993).

Advanced Issues Question 4
If an agency declares an I&I proposal non-negotiable, it is required to postpone implementing the intended change if a negotiability appeal is timely filed.
Advanced Issues Answer 4
The correct answer is FALSE.

An agency is not required to postpone implementation pending resolution of a negotiability appeal.

However, it acts at its peril. If the proposal is later ruled negotiable, the agency is liable for a ULP finding.

See *IRS, Atlanta*, 18 FLRA 731.

Advanced Issues Question 5
In those cases in which an agency is found to have implemented changes without first meeting I&I bargaining obligations, the remedy must include a *status quo ante* order.
Advanced Issues Answer 5
The correct answer is FALSE.

The FLRA has declined to order *status quo ante* remedies where they would unduly disrupt agency operations.

See *Air Force Materiel Command*, 54 FLRA 914.

Advanced Issues Question 6
If an agency makes a change pursuant to the emergency provision in 5 U.S.C. 7106 (a)(2)(D), it cannot be required to bargain I&I post-implementation.
Advanced Issues Answer 6
The correct answer is FALSE.

Although an agency is not required to bargain *before* implementing a change necessitated by an emergency under 5 U.S.C. 7106 (a)(2)(D), it may be required to bargain post-implementation upon request.

See *Customs Service, San Ysidro,* 29 FLRA 307.

Advanced Issues Question 7
A matter may be considered to be "covered by" an agreement even if it is not specifically mentioned in the agreement.
Advanced Issues Answer 7
The correct answer is TRUE.

Even though a matter is not specifically mentioned, it may be considered "covered by" an agreement if it is "inextricably bound up with" provisions that are contained in the agreement.

See *Customs Service*, 55 FLRA 43.

Advanced Issues Question 8
An I&I proposal is outside the duty to bargain if it would directly interfere with the exercise of a management right under 7106 (a).
Advanced Issues Answer 8
The correct answer is FALSE.

A proposal may be within the duty to bargain even if it directly interferes with the exercise of a management right.

If the interference is not *excessive*, the proposal may constitute an *appropriate arrangement* and fall within the duty to bargain.

See *Kansas Air National Guard*, 21 FLRA 24.

Advanced Issues Question 9
Agencies are not required to provide notice and bargain upon request before eliminating an established practice deemed to be in conflict with law or a government-wide regulation.
Advanced Issues Answer 9
The correct answer is TRUE.

Agencies are not required to bargain before bringing a practice into compliance with law or controlling government-wide regulations.

See *Portsmouth Naval Shipyard*, 49 FLRA 1522, and *Wright-Patterson AFB*, 51 FLRA 1532.

Advanced Issues Question 10
An agency is required to respond to a union's proposals, even if none of them are within the duty to bargain, before implementing an intended change.
Advanced Issues Answer 10
The correct answer is TRUE.

Agencies are required to provide a response, even if only to point out that a union's proposals are non-negotiable, in order to meet their bargaining obligation.

See *INS*, 55 FLRA 892.

Key Points re: Advanced Issues
1. No obligation to bargain if a proposal:
    -is "covered by" an agreement
    -requires waiver of a statutory right
    -is not directly related to the change
    -is not within the duty to bargain
    -delays conforming with law, regulation
2. Obligation to bargain if a proposal:
    -is an "appropriate arrangement"
    -follows an OK unilateral change

ADVANCED TOPICS – LABOR RELATIONS TERMS - EXPLAINED

GLOSSARY OF FEDERAL SECTOR LABOR-MANAGEMENT RELATIONS TERMS

ABROGATION TEST. A test the **Federal Labor Relations Authority** applies in determining whether an arbitration award enforcing a contract provision affecting rights reserved to management is deficient. If the provision at issue is an "arrangement" for employees adversely affected by the exercise of those rights, an award enforcing such a provision will not be set aside unless it "abrogates" those rights – i.e., unless it leaves management no discretion at all.

ACCRETION. When some employees are transferred to another employing entity whose employees are already represented by a union, the FLRA will often find that those employees have "accredit" to (i.e., become part of) the existing **unit** of the new employer, with the result that the transferred employees have a new **exclusive representative** along with a new employer.

ACTIONS DURING EMERGENCIES. Management's right "to take whatever actions may be necessary to carry out the agency mission during emergencies" doesn't come up in negotiability disputes very often. In cases decided thus far, the FLRA has held that this right is interfered with by proposals attempting to define "emergency" because such definitions would be inconsistent with management's right to independently determine whether an emergency exists.

ADMINISTRATIVE LAW JUDGE (ALJ). An individual who conducts hearings and makes initial decisions on behalf of the Federal labor Relations Authority (FLRA). Most of the hearings are for the purpose of adjudicating unfair labor practice complaints. The decision of an ALJ is final and non-precedent setting unless one of parties files an exception to the decision with the FLRA.

ADVERSE ACTION. An official personnel action, usually taken for disciplinary reasons, which adversely affects an employee and is of a severity such as suspension for more than 14 days, reduction in grade or status, or removal. For most Federal employees, an appeal system established by statute exists. The employee may choose to use the statutory or, if covered under the contract permits, the negotiated grievance procedure, but not both.

ADVERSE IMPACT. Change in working conditions that works to the disadvantage of employees. Depends on the occurrence of a chain of events and are not necessarily inevitable (reasonably foreseeable). Generally involves more than merely a hypothetical or speculative concern.

AGENCY HEAD REVIEW. A statutory requirement that negotiated agreements be reviewed for legal sufficiency by the head of the agency (or his/her designee). This must be accomplished within 30 days from the date the agreement is executed. If disapproved, the union can challenge those determinations by filing a **negotiability** petition or an **unfair labor practice** charge with the FLRA If not approved or disapproved within that time, the agreement goes into effect and the legality and enforceability of its terms is decided in other forums (e.g., grievance or unfair labor practice proceedings).

AGENCY SHOP. A requirement that all employees in the **unit** pay dues or fees to the union to defray the costs of providing representation.

AGREEMENT, NEGOTIATED. A collective bargaining agreement between the employer and the exclusive representative. A collective bargaining agreement must contain a negotiated grievance procedure. Also defined as a written agreement between an employer and a labor organization, usually for a definite term, defining conditions of employment, rights of employees and labor organizations, and procedures to be followed in settling disputes or handling issues that arise during the life of the agreement. [Also known as Agreement, CBA, Contract, Labor-Management Agreement or Negotiated Agreement.]

AMENDMENT OF CERTIFICATION PETITION. That portion of the FLRA's multipurpose petition not involving a **question concerning representation** that may be filed at any time in which the petitioner asks the FLRA to amend the certification or recognition to, e.g., reflect changes in the names of the employer or the union.

AMERICAN ARBITRATION ASSOCIATION (AAA). A private nonprofit organization that, among other things, provides lists of qualified arbitrators to unions and employers.

APPLICABLE LAWS. The Authority has said that "applicable laws" within the meaning of title 5, United States Code, section 7106(a)(2), include statutes, the Constitution, judicial decisions, certain Presidential executive orders, and regulations "having the force and effect of law"--i.e., regulations that (1) affect individual rights and obligations, (2) are promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress, and (3) satisfy certain procedural requirements, such as those of the Administrative Procedures Act.

APPROPRIATE ARRANGEMENT. One of three exceptions to management's rights. Under title 5, United States Code, section 7106(b)(3), a proposal that interferes with management's rights can nonetheless be negotiable if the proposal constitutes an "arrangement" for employees adversely affected by the exercise of a management right and if the interference with the management right isn't "excessive" (as determined by an "**excessive interference**" balancing test). Also defined as arrangements for employees adversely (detrimentally) affected by the exercise of a management right or rights contained in 5 USC 71*(a) and (b)(1). The purposes of such are to address or compensate for the "actual or anticipated" adverse effects caused by the exercise of a management right or rights. To be appropriate, an arrangement proposed must concern affected conditions of employment resulting from the exercise of those rights, cannot conflict with law, government-wide rules or regulations, excessively interfere with the exercising of a management right or rights or concern matters within the employee{ s) ' control.

APPROPRIATE UNIT (**BARGAINING UNIT**). A grouping of employees that a union represents or seeks to represent and that the FLRA finds appropriate for **collective bargaining** purposes.

ARBITRATION. See **ARBITRATOR**.

ARBITRATOR. An impartial third party to whom the parties to an agreement refer their disputes for resolution and decision (award). An *ad hoc arbitrator* is one selected to act in a specific case or a limited group of cases. A *permanent arbitrator* is one selected to serve for the life of the agreement or a stipulated term, hearing all disputes that arise during this period.

Grievance arbitration. When the arbitrator interprets and applies the terms of the collective bargaining agreement--and/or, in the Federal sector, laws and regulations determining conditions of employment.

Interest arbitration. When the arbitrator resolves bargaining impasses by dictating some of the terms of the collective bargaining agreement.

ARBITRABILITY. Refers to whether a given issue is subject to arbitration under the negotiated agreement. If the parties disagree whether a matter is arbitrable or not, the arbitrator must resolve this threshold issue before reviewing the merits of the dispute.

ASSIGN EMPLOYEES. A management right relating to the assignment of employees to positions, shifts, and locations. This right includes discretion to determine "the personnel requirements of the work of the position, i.e., the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability." It also includes discretion to determine the duration of the assignment.

ASSIGN WORK. A management right relating to the assignment of work to employees or positions. The right to assign work includes discretion to determine who is to perform the work; the kind; the amount of work to be performed; the manner in which it is to be performed, as well as when it is to be performed. It also includes "the right to determine the particular qualifications and skills needed to perform the work and to make judgments as to whether a particular employee meets those qualifications."

ATTORNEY FEES. In accordance with 5 U.S.C. 5596 (Back Pay Act), an award of counsel fees if there is a determination by an arbitrator or the Merit Systems Protection Board that an unjustified or unwarranted personnel action has resulted in the withdrawal of a grievant's pay, allowances or differentials. The award must be in conjunction with an award of back pay on correction of the personnel action, the award must be reasonable and related to the personnel action, and the award must be in accordance with standards established under 5 U.S.C. 7701(g). Under 5 U.S.C. 7701(g), the employee, to obtain fees, must be the prevailing party, the award must be in the interest of justice (other than in a case involving discrimination), the fee must be reasonable, and it must have been incurred by the employee.

AUTHORITY. See **FEDERAL LABOR RELATIONS AUTHORITY**.

AUTOMATIC RENEWAL CLAUSE. Many, perhaps most, collective bargaining agreements in the Federal sector have a provision, usually located at the end of the agreement, stating that if neither party gives notice during the agreement's 105-60 day **open period** of its intent to reopen and renegotiate the agreement, the agreement will automatically renew itself for a period of x number of years.

AWARD. In labor-management arbitration, the final decision of an arbitrator, final and binding on both parties. In very limited circumstances, either party may appeal the arbitrator's decision to the Federal Labor Relations Authority (e.g. award is contrary to law).

BACK PAY. Pay awarded an employee for compensation lost due to an unjustified personnel action are governed by the requirements of the Back Pay Act, title 5, United States Code, section 5596.

BARGAINING (NEGOTIATING). A ubiquitous process--sometimes informal and spontaneous, sometimes formal and deliberate--of offer and counteroffer whereby parties to the bargaining process try to reach agreement on the terms of exchange. Formal bargaining processes with associated rituals and bargaining routines vary, depending on their political, economic, and social context. Also defined as the performance of the mutual obligation of the representatives of the agency and union to meet at reasonable times, consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting bargaining unit employees and, upon request, to execute a written document. (Does not compel either party to agree to a proposal or make a concession)

BARGAINING AGENT. The union holding exclusive recognition for an **appropriate unit.**

BARGAINING IMPASSE (IMPASSE). When the parties have reached a deadlock in negotiations they are said to have reached an impasse. The statute provides for assistance by **Federal Mediation and Conciliation Service** mediators and the **Federal Service Impasses Panel** to help the parties settle impasses.

BARGAINING RIGHTS. Legally recognized right of the labor organization to represent employees in negotiations with employers.

BARGAINING UNIT. See **APPROPRIATE UNIT**.

BINDING ARBITRATION. The law requires that collective bargaining agreements contain a negotiated grievance procedure that terminates in binding arbitration of unresolved grievances.

BROOKHAVEN WARNINGS. Even if the Union is notified that an Agency representative is going to interview a bargaining unit employee for an upcoming arbitration, and a Union representative attends this interview, this does NOT mean that "anything goes" as far as the manner of questioning. What the Agency may consider an "interview" from the Union perspective may be considered an "interrogation." The interview of the bargaining unit member should be voluntary and non-coercive. Brookhaven warnings are designed to minimize the potentially coercive impact of an Agency interview with an employee

BUDGET. A right reserved to management. The Authority has fashioned a two-prong test that it uses to determine whether a proposal interferes with an agency's right to determine its budget: namely, the proposal either has to prescribe particular programs, operations or amounts to be included in an agency's budget, or the agency can substantially demonstrate that the proposal would result in significant and unavoidable cost increases that are not offset by compensating benefits.

BYPASS. Dealing directly with employees rather than with the **exclusive representative** regarding negotiable **conditions of employment** of bargaining **unit** employees. A bypass is a violation of the **Federal Service Labor-Management Relations Statute**. **CARVEOUT**. An attempt, usually unsuccessful under the **Federal Service Labor-Management Relations Statute** because it fosters unit fragmentation, to carve out (or sever)--usually along occupational lines (firefighters, nurses)--a subgroup of employees in an existing bargaining **unit** in order to establish a separate, more homogenous unit with a different union as **exclusive representative**.

CERTIFICATION. The FLRA's determination of the results of an election or the status of a union as the **exclusive representative** of all the employees in an appropriate unit.

CERTIFICATION BAR. One-year period after a union is certified as the **exclusive representative** for a unit during which petitions by rival unions or employees seeking to replace or remove the incumbent union will be considered untimely. The bar is designed to give the certified union an opportunity to negotiate a substantive agreement, after which the contract can become a bar, except during the contract's 105-60 day **open period**, to a representation petition. Also see **CONTRACT BAR** and **ELECTION BAR**.

CHALLENGED BALLOTS. Ballots that are challenged by election observers on the ground that the person casting the ballot isn't eligible to vote because, e.g., he or she is a **management official**, **supervisor**, **confidential employee** or engaged in **personnel work**. Challenged ballots usually are kept separate and if, after tallying the uncontested ballots, it is determined that there are enough challenged ballots to affect the outcome of the election, the Authority's agents will rule on each challenged ballot to see whether it should be counted.

CHECKOFF. See **DUES ALLOTMENT.**

CHIEF STEWARD. A union official who assists and guides shop stewards. The roles he or she plays within the union are determined by the union. The roles he or she plays in administering the contract are determined by the contract. For example, the **negotiated grievance procedure** may provide that the chief steward becomes the union representative if the grievance reaches a certain step in the grievance procedure.

CLARIFICATION OF UNIT PETITION. That portion of the FLRA's multipurpose petition *not* involving a **question concerning representation** that may be filed at any time in which the petitioner (union or management) asks the FLRA to determine the bargaining unit status of various employees--i.e., to determine whether they are management officials, supervisors, employees engaged in non-clerical personnel work, or confidential employees, and therefore excluded from the unit (and from the coverage of the collective bargaining agreement applicable to the unit and its negotiated grievance procedure).

COLLECTIVE BARGAINING. Literally, bargaining between and/or among representatives of collectivities (thus involving internal as well as external bargaining); but by custom the expression refers to bargaining between labor organizations and employers. **CIVIL SERVICE REFORM ACT OF 1978 (CSRA)**. Legislation enacted in October 1978 for the purpose of improving the civil service. It includes the **Federal Service Labor-Management Relations Statute** (FSLMRS), Chapter 71 of title 5 of the United States Code. Also known as Public Law 95-454 passed by the 95th Congress on October 13, 1978, which became effective on January 11, 1979. Title VII of the Act concerns Federal Service Labor-Management Relations and supersedes Executive Order 11491 as amended. This provided Federal employees a legal, statutory basis for their right to organize, bargain collectively, and participate through labor unions in decisions, which affect their working conditions. Title VII is codified at 5 U.S.C. Chapter 71.

CLASSIFICATION ACT EMPLOYEES. Federal employees--typically professional, administrative, technical, and clerical employees (i.e., "white collar" employees)--sometimes referred to a "General Schedule" employees, to distinguish them from Federal Wage System (blue collar, Wage Grade) employees.

COLLECTIVE BARGAINING OR NEGOTIATIONS. The performance of the mutual obligation of the employer and the exclusive representative to meet at reasonable times, to consult and bargain in good faith, and upon request by either party to execute a written agreement with respect to terms and conditions of employment. This obligation does not compel either party to agree to proposals or make concessions.

COLLECTIVE BARGAINING AGREEMENT (CBA). See **AGREEMENT, NEGOTIATED**.

COMPELLING NEED. Test used to determine whether a discretionary agency regulation that doesn't involve the exercise of management's is a valid limitation on the **scope of bargaining**. There are three "illustrative criteria" of compelling need: (1) the regulation is essential to the effective and efficient accomplishment of the mission of the agency, (2) the regulation is necessary to insure the maintenance of basic merit principles, and (3) the regulation implements a mandate of law or other authority (e.g., a regulation) in an essentially non-discretionary manner.

CONCILIATION. See **MEDIATION**.

CONDITIONS OF EMPLOYMENT (COE). Under title 5, United States Code, section 7103(a)(14), conditions of employment "means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise [e.g., by custom or practice], affecting working conditions, except that such term does not include policies, practices, and matters – (A) relating to political activities prohibited under subchapter III of chapter 73 of this title; (B) relating to the classification of any positions; or (C) to the extent such matters are *specifically provided for by Federal statute*." (Emphasis added). It does not include policies, practices and matters relating to prohibited political activities, to the classification of any position, or to the extent the matters are specifically provided for by statute.

CONFIDENTIAL EMPLOYEE. An employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations. Confidential employees must be excluded from bargaining units.

CONSULTATION. To be distinguished from **negotiation**. The FSLMRS provides for two types of consultation: between qualifying unions and agencies concerning agency-wide regulations and qualifying unions and those agencies issuing Government-wide regulations.

CONTRACT BAR. The incumbent union is protected from challenge by a rival union if there is an agreement in effect having a term of not more than three years, except during the agreement's **open period**"--i.e., 105 to 60 days prior to the expiration of the agreement. See **ELECTION BAR** and **CERTIFICATION BAR.**

CONTRACTING OUT. A right reserved to management that includes the right to determine what criteria management will use to determine whether or not to contract out agency work.

"COVERED BY" DOCTRINE. A doctrine under which an agency does not have to engage in **midterm bargaining** on particular matters because those matters are already "covered by" the existing agreement.

A defense to an allegation of a refusal to bargain, resulting agency initiated changes or union-initiated mid-term bargaining request. It applies when an agency proposes to take a specific action, or the union initiates a proposal, concerning a "condition of employment" but the agency refuses to negotiate with the union over the matter based on its belief that the matter has already been the subject of negotiations and is therefore covered by the parties' agreement. ' The Authority has defined "matter" as the general topic of dispute, rather than the more limited topic which may be the subject of the union" concerns over an agency action or the unions particular mid-contract proposal.

DECERTIFICATION. The FLRA's withdrawal of a union's **exclusive recognition** because the union no longer qualifies for such recognition, usually because it has lost a representational election.

DECERTIFICATION PETITION. A petition filed by employees in an existing unit (or an individual acting on their behalf) asking that an election be held to give unit employees an opportunity to end the incumbent union's exclusive recognition. Such a petition must be accompanied by a 30 per cent showing of interest and be timely filed (i.e., not barred by election, certification or contract bars).

DE MINIMIS. According to Black's Law is, of a fact or thing so insignificant that a court may over look it in deciding an issue or case.

The FLRA position of de minimis has long recognized that requiring agencies to bargain over every single management action, no matter how slight, would be impractical. Consequently, it has held that agencies are obligated to bargain over the impact and implementation of a management action only if the changes effected by that action will have more than a de minimis -- that is, more than a minimal -- effect on conditions of employment. SSA and AFGE, Local 1760, 24 FLRA 403.

In determining whether a change is de minimis, the FLRA will consider the nature of the change and the extent to which it will impact bargaining unit employees. In applying this standard, keep the following FLRA pronouncements in mind:

1. The overall size of the bargaining unit is irrelevant.
2. The FLRA will consider the number of employees affected by the change, but this factor is not controlling.
3. A change that has a major impact on just one employee will not automatically be considered de minimis.
4. The FLRA will take "equitable" considerations into account, such as the underlying reasons
5. for the change.
6. The duration of a change can be an important factor.

The point at which a change becomes more than de minimis can be difficult to ascertain, but, as the term implies, it doesn't take much. In short, it's unwise to assume that a change is de minimis without carefully considering exactly what's involved in it. And if there are any doubts whatsoever, case law demonstrates that agencies are better served by erring on the side of caution. When in doubt, assume a change is not de minimis.

DIRECT EMPLOYEES. The Authority has defined this right to include discretion "to supervise and guide [employees] . . . in the performance of their duties on the job." The right to direct, *by itself*, rarely is used as the basis for finding a proposal nonnegotiable. However, when combined with the right to assign work, it is the basis for finding proposals establishing performance standards nonnegotiable.

DISCIPLINE. A right reserved to management that the FLRA has said includes the right "to investigate to determine whether discipline is justified. " It also "encompasses the use of the evidence obtained during the investigation."

DOCTRINE. A rule, principle, theory or tenet (fundamental principle) of the law; as e.g. Covered by Doctrine; Waiver Doctrine, Etc.

DUES ALLOTMENT (WITHHOLDING, CHECKOFF). Dues withholding services provided by the agency to unions that win exclusive recognition or dues withholding recognition. If the former, the services must be provided without charge to the union. Employee dues assignments must be voluntary (no union or agency shop arrangements permitted under the **Federal Service Labor-Management Relations Statute**) and may not be revoked except at yearly intervals or if a member becomes ineligible (i.e. promotion to supervisor, etc.), but must be terminated when the agreement ceases to be applicable to the employee or when the employee is expelled from membership in the union.

DUES WITHHOLDING RECOGNITION. A very limited form of recognition, under which a union that can show that it has 10 per cent of employees in an appropriate unit as members can qualify for the right only to negotiate a dues deduction arrangement. Such recognition becomes null and void as soon as a union is certified as the **exclusive representative** of the unit.

DURATION CLAUSE (TERM OF AGREEMENT). Clause in a collective bargaining agreement that specifies the time period during which the agreement is in effect (normally three years). Where an agreement has a term greater than three years, the agreement serves as a contract bar only during the first three years.

DUTY OF FAIR REPRESENTATION. "An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership."

DUTY TO BARGAIN. Broadly conceived, it refers to both (1) the *circumstances* under which there is a duty to give notice and, upon request, engage in bargaining (see **MIDTERM BARGAINING**) and (2) the *negotiability* of specific proposals. Disputes over the former usually are processed through the Authority's **unfair labor practice procedure** and frequently involve make-whole and *status quo ante* remedies. Disputes over the latter usually are processed through the Authority's no-fault **negotiability** procedure in which the Authority determines whether or not there is a duty to bargain on the proposal at issue. Encompasses bargaining to the point of obtaining a CBA over on-going changes in working conditions (midterm) that are not clearly covered-by the collective bargaining agreement or previously waived by the union; and bargaining over matters initiated by a union before, during (midterm covered-by and waiver tests apply) or after the term of a CBA.

ELECTION AGREEMENT. Agreement entered into by the agency and the union(s) competing for exclusive recognition dealing with campaign procedures, election observers, date and hours of election, challenge ballot procedures, mail balloting (if used), position on the ballot, payroll period for voter eligibility, and the like. Such an agreement is subject to approval by the appropriate FLRA Regional Director.

ELECTION BAR. One-year period after the FLRA has conducted a secret-ballot election for a unit of employees, where the election did not lead to the certification of a union as exclusive representative. During this one-year period the FLRA will not consider any representation petitions for that unit or any subdivisions thereof. See **CERTIFICATION BAR** and **CONTRACT BAR**.

EMPLOYEE. The term "employee" includes an individual "employed in an agency" or "whose employment in an agency has ceased because of any unfair labor practice," but does not include supervisors and management officials or anyone who participates in a strike or members of the uniformed services or employees in the Foreign Service or aliens occupying positions outside the United States.

EQUIVALENT STATUS. Status given a union challenging the incumbent union that entitles it to roughly equivalent access during the period preceding an election to facilities and services (bulletin boards, internal mail services, etc.) as that enjoyed by the incumbent union.

EXCEPTIONS TO ARBITRATION AWARDS. A claim that an arbitration award is deficient "on…grounds similar to those applied by Federal courts in private sector labor-management relations," or because it violates law, rule or regulation. Some of the "grounds similar to those applied by Federal courts" are: the award doesn't draw its essence from the agreement, the award is based on a non-fact, the arbitrator didn't conduct a fair hearing, or the arbitrator exceeded his/her authority. Under 5 U.S.C. 7122, either party to arbitration may file with the Federal Labor Relations Authority an exception (appeal) to an arbitrator's award because the award is 1) contrary to any law, rule or regulation; or 2) on other grounds similar to those applied by Federal courts in private sector labor-management relations (e.g., award does not draw its essence from the agreement; resolving issues not submitted to arbitration; granting remedy that exceeds claimed violation). The Authority will not consider an exception with respect to an award relating to actions taken in accordance with 5 U.S.C. 4303 and 5 U.S.C. 7512. See also 5 CFR Part 2425.

EXCESSIVE INTERFERENCE. A balancing test that the FLRA applies to proposals that are arrangements for employees adversely affected by the exercise of management's rights in order to determine whether they are negotiable **appropriate arrangements**. The test involves balancing the extent to which the proposal ameliorates anticipated adverse effects against the extent to which it places restrictions on the exercise of management's rights.

EXCLUSIVE RECOGNITION. Under the **Federal Service Labor-Management Relations Statute**, exclusive recognition is normally obtained by a union as a result of receiving a majority of votes cast in a representational election. The rights a union is accorded as a result of being certified as the **exclusive representative** of the employees in a bargaining unit include, among other things, the right to *negotiate* bargainable aspects of the conditions of employment of bargaining unit employees, to be afforded an opportunity to be present at *formal discussions*, to free *check-off* arrangements and, at the request of the employee, to be present at *Weingarten* examinations.

EXCLUSIVE REPRESENTATIVE . The union that is certified as the exclusive representative of a unit of employees either by virtue of having won a representation election or because it had been recognized as the exclusive representative before passage of the CSRA. See **EXCLUSIVE RECOGNITION**. A union holding exclusive recognition is sometimes referred to as the exclusive bargaining agent of the unit.

EXTERNAL LIMITATIONS ON THE EXERCISE OF MANAGEMENT'S RIGHTS. Discretion reserved to management isn't unfettered. Quite apart from any limitations that may be found in the collective bargaining agreement (such as an **appropriate arrangement** provision), its discretion must also be exercised in accordance with the laws and regulations that set limitations on management discretion. Only those external limitations on the exercise of certain rights can be enforced by the union under the **negotiated grievance procedure**. See **APPLICABLE LAWS**.

FAIR REPRESENTATION, DUTY OF. The union's duty to represent the interests of all unit employees without regard to union membership.

FEDERAL LABOR RELATIONS AUTHORITY (FLRA, AUTHORITY). The independent agency responsible for administering the **Federal Service Labor-Management Relations Statute** (FSLMRS). As such, it decides, among other things, representation issues (e.g., the bargaining **unit** status of certain employees), **unfair labor practice**s (violations of any of the provisions of the FSLMRS), **negotiability disputes** (i.e., **scope of bargaining** issues), **exceptions to arbitration awards**, as well as resolve disputes over consultation rights regarding agency-wide and Government-wide regulations. The FLRA maintains nine regional offices. Also see the FLRA web page at http://www.flra.gov/

FEDERAL MEDIATION AND CONCILIATION SERVICE (FMCS). An independent agency that provides mediators to assist the parties in negotiations. Although the bulk of its work is in the private sector, it also provides its services to the Federal sector. FMCS also maintains a roster of qualified private arbitrators, panels of which are referred to the parties upon joint request. See **MEDIATION**. Also see the FMCS webpage at http://www.flra.gov/

FEDERAL SERVICE IMPASSES PANEL (FSIP or Panel). An entity within the FLRA that resolves bargaining impasses, chiefly by ordering the parties to adopt certain contractual provisions relating to the conditions of employment of unit employees. The Panel uses many procedures for resolving impasses, including fact-finding, med-arb, final-offer interest arbitration, either by the Panel, individual members of the Panel, the Panel's staff, or by ordering the parties to refer their impasse to an agreed-upon private arbitrator who is to provide services. The Panel is empowered to "take whatever action is necessary and not inconsistent with [the Federal Service Labor-Management Relations Statute] to resolve the impasse." For more information on FSIP, see http://www.flra.gov/

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (FSLMRS). Title 5, United States Code, sections 7101 - 7135.

FINAL-OFFER INTEREST ARBITRATION. A technique for resolving bargaining impasses in which the arbitrator is forced to choose among the final positions of the parties--rather than order adoption of some intermediate position (i.e., "split the difference"). It can apply to individual items or "packages" of items. The theory is that each party, expecting that the interest arbitrator will pick the most reasonable of the two final offers, will have an incentive to move closer to the position of the other party in order to increase the odds that the arbitrator will select its final offer as the more reasonable of the two. This in turn narrows the gap between the parties. If the gap is narrow enough, it can be bridged by the parties themselves (by, e.g., splitting the difference).

FORMAL DISCUSSION. Under title 5, United States Code, section 7114(a)(2)(A), the **exclusive representative** must be given an opportunity to be represented at "any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any *grievance* or any personnel policy or practices or other *general condition of employment*." (Italics added.) Under 5 U.S.C. 7114(a)(2)(A), a discussion between an agency representative(s) and a bargaining unit employee(s) concerning any grievance or any personnel policy or practice or other condition of employment which affects bargaining unit employees. The exclusive representative must be given the opportunity to be represented at these meetings.

FREE SPEECH. Under title 5, United States Code, section 7116(e), the expression of personal views or opinions, even if critical of the union, is not an **unfair labor practice** if such expression is not made in the context of a representational election and if it "contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." During the conduct of an election, however, management officials must be neutral. This limited right of free speech applies to agency representatives.

GENERAL COUNSEL. The General Counsel of the **Federal Labor Relations Authority** investigates **unfair labor practice** (ULP) *charges* and files and prosecutes ULP *complaints*. He/she also supervises the Authority's Regional Directors who, in turn, have been delegated authority by the FLRA to process representation petitioners.

GOOD FAITH BARGAINING. A statutory duty to approach negotiations with a sincere resolve to reach a collective bargaining agreement, to be represented by properly authorized representatives who are prepared to discuss and negotiate on any **condition of employment**, to meet at reasonable times and places as frequently as may be necessary and to avoid unnecessary delays, and, in the case of the agency, to furnish upon request data necessary to negotiation. Also defined as: The overall behavior and effort on the part of an agency and union during the negotiations process. This includes the obligation on the part of an agency and union to: approach negotiations with a sincere resolve to reach agreement; send duly authorized representatives prepared to discuss and negotiated on any condition of employment; meet at reasonable times and convenient places as frequently as necessary and to avoid unnecessary delays; execute, upon request, a written document incorporating the agreed terms, and to take such steps as are necessary to implement the agreement. And in the case of an agency, to furnish to the union upon request and, to the extent not prohibited by law, data ---

- Which is normally maintained in the regular course of business;
- Which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and,
- Which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

GOVERNMENTWIDE REGULATIONS. Regulations issued by an agency bearing on conditions of employment that must be complied with by other agencies. Such regulations are a major limitation on agency discretion and therefore on the **scope of bargaining**, which presupposes agency discretion. Agencies chiefly involved in issuing such regulations are the **Office of Personnel Management** (on personnel management) and the General Services Administration (on property management). See, also, **CONSULTATION.**

GRIEVANCE. Under title 5, United States Code, section 7103(a)(9), a grievance "means any complaint – (A) by an employee concerning any matter relating to the employment of the employee; (B) by any labor organization concerning any matter relating to the employment of any employee; or (C) by an employee, labor organization, or agency concerning – (I) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."

GRIEVANCE ARBITRATION. See **ARBITRATOR**.

GRIEVANCE BAR. A claim by either party to a collective bargaining relationship that a statutory appeal was previously filed involving the same facts and theories alleged in a subsequently filed grievance.

GRIEVANCE PROCEDURE. A systematic procedure, devised by the parties to the agreement, by which a grievance moves from one level of authority to the next higher level until it is settled, withdrawn, or referred to arbitration. Under title 5, United States Code, section 7121, a collective bargaining agreement must contain a grievance procedure terminating in final and binding arbitration. Apart from matters that must by statute be excluded (such as grievances relating to retirement, health and life insurance and the classification of positions), the scope of the grievance procedure is to be negotiated by deciding what matters are to be excluded from an otherwise "full scope" procedure--i.e., a procedure that covers all the matters mentioned in the statutory definition of "grievance." See **NEGOTIATED GRIEVANCE PROCEDURE**.

HIRE EMPLOYEES. A right reserved to management. The Authority has said that "the probationary period, including summary termination, constitutes an essential element of an agency's right to hire under [title 5, United States Code,] section 7106(a)(2)(A)."
See **SELECT** for a discussion of the much more frequently utilized right of management, in filling positions, to make selections for appointments from any appropriate source. The relationship between the right to hire and the right to select is still unclear.

IMPASSE. See **BARGAINING IMPASSE**.

I&I (IMPACT AND IMPLEMENTATION) BARGAINING. Even where the decision to change conditions of employment of unit employees is protected by management's rights, there is a duty to notify the union and, upon request, bargain on **procedures** that management will follow in implementing its protected decision as well as on **appropriate arrangements** for employees expected to be adversely affected by the decision. Such bargaining is commonly referred to as "impact and implementation," or "I&I" bargaining, which is the commonest variety of **midterm bargaining**.

INFORMATION. The union, to the extent not prohibited by law (e.g., the Privacy Act), is entitled, under certain circumstances (see **PARTICULARIZED NEED**, below), to data "for full and proper discussion, understanding, and negotiation of subjects within the **scope of bargaining**." The agency must provide that information free of charge.

INTEREST. In **interest-based bargaining**, the concerns, needs, or desires behind an issue: *why* the issue is being raised.

INTEREST ARBITRATION. The arbitrator, instead of interpreting and applying the terms of an agreement to decide a grievance, determines what provisions the parties are to have in their collective bargaining agreement. Also see **ARBITRATION**.

INTEREST-BASED BARGAINING (IBB). A bargaining technique in which the parties start with (or at least focus on) interests rather than proposals; agree on criteria of acceptability that will be used to evaluate alternatives; generate several alternatives that are consistent with their interests, and apply the agreed-upon acceptability criteria to the alternatives so generated in order to arrive at mutually acceptable contract provisions. The success of the technique depends, in large measure, on mutual trust and a willingness to share information. But even where this is lacking, the technique, with its focus on interests and on developing alternatives, tends to make the parties more flexible and open to alternative solutions and thus increases the likelihood of agreement.

INTERNAL SECURITY PRACTICES. A right reserved to management by title 5, United States Code, section 7106(a)(1). The right to determine the internal security practices of an agency isn't limited to establishing "those policies and actions which are part of the Agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the Agency's activities." It also extends to safeguarding the agency's personnel.

INTERVENTION/INTERVENOR. The action taken by a competing labor organization (intervenor) to place itself as a contender on the ballot for a recognition election originally initiated by another union (petitioner). Non-incumbent intervenors need only produce a 10 per cent showing of interest to be included on the ballot.

INVESTIGATORY EXAMINATION. See **WEINGARTEN RIGHT**.

JENKS RULE. Even if it overcomes privileges, the rule is discretionary as to pre-testimony documents. You can always ask the witness if their testimony is based on any document. Likewise, at deposition you can ask about documents that might be relevant to the case generally. But asking, "describe for me each document that you reviewed in preparation for today's deposition" would be an objectionable question. *In short, the "JENKS RULE" is a rule permitting the production of a protected affidavit for purposes of cross examination.*

LABOR ORGANIZATION. A union--i.e., an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment.

LAYOFF EMPLOYEES. Right reserved to management by title 5, United States Code, section 7106(a)(2)(A).

MANAGEMENT OFFICIAL. An individual who formulates, determines, or influences the policies of the agency. Such individuals are excluded from **appropriate units**.

MANAGEMENT RIGHTS. Refers to types of discretion reserved to management officials by statute.

- **Core rights**. Consists of the rights "to determine the mission, budget, organization, number of employees, and internal security practices of the agency."

- **Operational rights**. Consists of the rights to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; with respect to filling positions, to make selections for appointments from-- among properly ranked and certified candidates for promotion; or any other appropriate source; and to take whatever actions may be necessary to carry out the agency mission during emergencies.

- **Three exceptions**. The three title 5, United States Code, section 7106(b) exceptions to the above involve (1) **title 5, United States Code, section 7106(b)(1) permissive subjects** of bargaining (e.g., staffing patterns, technology) on which, under the statute, agencies can elect to bargain, (2) **procedures** management will follow in exercising its reserved rights, and (C) **appropriate arrangements** for employees adversely affected by the exercise of management rights.

  1. "Permissive" subjects exception. This exemption to management's rights "staffing patterns" – i.e., with "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" and with "the technology, methods, and means of performing work." Under the statute such matters are, moreover, negotiable "at the election of the agency" even if the proposal also directly interferes with the exercise of a title 5, United States Code, section 7106(a) right.
  2. Procedural "exception." Title 5, United States Code, section 7106(b)(2), dealing with procedures, really isn't an exception to management's rights as the Authority has held that a proposed "procedure" that "directly interferes" with a management right is not a procedure within the meaning of title 5, United States Code, section 7106(b)(2).
  3. Appropriate arrangement exception. Title 5, United States Code, section 7106(b)(3) applies only if the proposal is intended to ameliorate the adverse effects of the exercise of a management right. Where such is the intent of the proposal, the Authority applies a balancing test in which it weighs the extent to which the proposal ameliorates the expected adverse effects against the extent to which it interferes with the management right and determines whether or not the specific proposal "excessively" interferes with management rights. If the interference is "excessive," the proposal isn't an "appropriate arrangement" and therefore is nonnegotiable. If otherwise, the proposal is a negotiable appropriate arrangement, even though it interferes with management's rights.

  To qualify as an "arrangement" to which it would be proper to apply the excessive interference balancing test, the proposal has to be "tailored" so that it applies only to those employees who would be adversely affected by the proposed management decision.

MANDATORY SUBJECTS OF BARGAINING. Those matters that the agency must bargain over upon receipt of a union's request, such as conditions of employment not otherwise waived by the union or covered by the parties' agreement.

MEDIATION. Use of a third party, usually a neutral without authority to impose a settlement, to assist the parties to reach agreement. Mediation techniques vary, but one common practice is for the labor mediator to separate the parties (in order to control communications) and meet with them separately and, in effect, engage in interest-based bargaining with them. Because the mediator usually is a neutral who cannot impose a settlement and because he or she is expected to keep confidences, each party is more willing to be open with the mediator than with the other party (or with an interest arbitrator). Because of this greater openness, the mediator often is able to see areas of possible agreement that the parties are unable to see in direct, unmediated, negotiations.

MED-ARB (mediation followed by interest arbitration). A process in which a neutral with authority to impose (or to recommend the imposition of) a settlement, first resorts to mediation techniques in an attempt to get the parties to voluntarily agree on unsettled matters, but who can later impose a settlement if mediation fails. The theory behind it is that the parties will be more receptive to the med-arb's suggestions for settlement if they know that the med-arb has authority to impose a settlement.

MERIT PRINCIPLES. Prohibited personnel practices and Merit Principles

Prohibited personnel practices means actions that are taken for reasons forbidden under law. They include unlawful discrimination; improper personnel solicitations and recommendations; coercing political activity; improperly influencing employment decisions; granting improper preferences in personnel decisions; appointing relatives improperly; retaliation against whistleblowers; retaliation for the exercise of appeal or grievance rights; discrimination on the basis of conduct which is not job-related; and violations of the merit system principles.

According to the nine merit systems principles outlined in 5 USC 2301(b), agencies must:

1. Recruit qualified individuals from all segments of society and select and advance employees on the basis of merit after fair and open competition.
2. Treat employees and applicants fairly and equitably, without regard to political affiliation, race, color, religion, national origin, sex, marital status, age or disability.
3. Provide equal pay for equal work and reward excellent performance.
4. Maintain high standards of integrity, conduct and concern for the public interest.
5. Manage employees efficiently and effectively.
6. Retain or separate employees on the basis of performance.
7. Educate and train employees when it will result in better organizational or individual performance.
8. Protect employees from improper political influence.
9. Protect employees against reprisal for the lawful disclosure of information in "whistleblower" situations when they disclose waste, fraud, abuse or illegal activities.

MIDTERM BARGAINING / NEGOTIATIONS. Literally, all bargaining that takes place during the life of the contract. Usually contrasted with term bargaining – i.e., with the renegotiation of an expired (or expiring) contract. Midterm bargaining includes **I&I bargaining**, **union-initiated midterm bargaining on new matters**; and bargaining pursuant to a **reopener** clause. It excludes matters that are already "**covered by**" the term agreement.

MISSION OF THE AGENCY. A right reserved to management by title 5, United States Code, section 7106(a)(1). Although illustrative case law on this particular right is meager, it is generally recognized that the right encompasses the determination of the products and services of an agency.

NATIONAL CONSULTATION RIGHTS (NCR). A union accorded national consultation rights is entitled to be consulted on *agency-wide* regulations before they are promulgated. NCR is to be distinguished from consultation rights with respect to *Government-wide* regulations, under which a union accorded such recognition must be consulted on proposed Government-wide regulations before they are promulgated.

NATIONAL UNION. Ordinarily, a union composed of a number of affiliated local unions. The Bureau of Labor Statistics in its union directory, defines a national union as one with agreements with different employers in more than one state, or an affiliate of the AFL-CIO, or a national organization of employees.

NEGOTIABILITY. Refers to whether a given topic is subject to bargaining between an agency and the union. The Federal Labor Relations Authority makes the final decision whether a subject is negotiable or nonnegotiable.

NEGOTIABILITY APPEAL (PETITION FOR REVIEW). If an agency believes that a union proposal is contrary to law or applicable regulation, or is otherwise nonnegotiable under the statute, it may inform the union of its refusal to negotiate. 5 U.S.C. 7117 provides a right to appeal the agency's determination of non-negotiability to the FLRA.

NEGOTIABILITY DETERMINATION. A decision reached by the Federal Labor Relations Authority on a request for expedited review of negotiability issues. Unions in disputes with agencies concerning what matters may be collectively bargained may file negotiability appeals, technically called petitions for review. A negotiability determination may be rendered when an agency claims a matter is non-negotiable or there is no duty to bargain. Matters that involve such allegations that do not involve the actual or contemplated changes in working conditions can only be filed under the negotiability appeal procedure.

NEGOTIABILITY DISPUTES. Disputes over whether a proposal is nonnegotiable because (a) it is inconsistent with laws, rules, and regulations establishing conditions of employment and/or (b) it interferes with the exercise of rights reserved to management. Negotiability disputes normally are processed under the FLRA's "no fault" negotiability procedures

NEGOTIATED GRIEVANCE PROCEDURE (NGP). A collective bargaining agreement (CBA) must contain a grievance procedure terminating in final and binding arbitration. The NGP, with a few exceptions involving statutory alternatives (e.g., adverse and performance-based actions), is the exclusive administrative procedure for grievances falling within its coverage. Apart from the matters excluded from the coverage of the NGP by statute – e.g., retirement, life and health insurance, classification of positions – the NGP covers those matters specified in the definition of grievance in title 5, United States Code, section 7103(a)(9) (see **GRIEVANCE**, above), minus any of those matters that the parties agree to exclude from the NGP. That is, under the FSLMRS program, the parties negotiate to determine what matters to *exclude* from the procedure rather than what matters it is to *include*--just the opposite from pre-FSLMRS and private sector practices.

A systematic procedure agreed to by the negotiating parties for the resolution of grievances. The negotiated grievance procedure is applicable only to employees in the bargaining unit. The scope of the negotiated grievance procedure is negotiated by the parties and may include certain matters for which a statutory appeal procedure exists, unless the parties negotiate their exclusion. Several matters **cannot** be included under its scope: 1) actions taken for violations of the Hatch Act; 2) retirement, life insurance or health insurance; 3) a suspension or removal taken in the interest of national security; 4) any examination, certification, or appointment; or 5) the classification of any position which does not result in the reduction in grade or pay of an employee. 5 U.S.C. 7121 requires the inclusion of a negotiated grievance procedure in all agreements and requires binding arbitration as the final step of the negotiated grievance procedure.

NEGOTIATION IMPASSE. If there are no disputes over the essential obligations of bargaining, assuming the parties' have bargaining in good faith but unsuccessfully over a negotiable proposal, it is point where the parties are unable to reach an agreement.

NON-NEGOTIABLE. A term used to indicate the subject matter of a management change does not concern a condition of employment for affected employees, is a reserved management right or because the matter is permissively negotiable and the agency has elected not to bargain. Additionally, the term applies to a union proposal that does not concern a condition of employment for affected employees, is in conflict with law, Government-wide rule or regulation or excessively interferes with a reserved management right.

NO-DUTY TO BARGAIN. A term used to indicate the subject matter of a management change or union initiated proposal involves a condition of employment for affected employees that has been previously waived by the union or is covered by the parties' collective bargaining agreement.

NUMBER OF EMPLOYEES OF AN AGENCY. A right reserved to management by title 5, United States Code, section 7106(a)(1). There have been no FLRA decisions in which a proposal has been found nonnegotiable because it interfered with this right.

OBJECTIONS TO ELECTION. Charges filed with the FLRA contesting election results because of alleged irregularities in the conduct of a representational election. If the objections are sustained, the FLRA could set aside the election results and order that the election be rerun.

OBLIGATION TO BARGAIN. The right to bargain is affirmative; if management does nothing, the union may require negotiations over working conditions. The right to bargain is also responsive; when management changes working conditions, the changes may lead to negotiations. That obligation is fulfilled through negotiations leading to a basic agreement, mid-term bargaining, and bargaining over impact and implementation decisions made within the ambit of management rights. In order to meet this obligation, management has the duty to give the exclusive bargaining representative advance notice of the proposed implementation of decisions and provide the union with an opportunity to participate in impact and implementation bargaining. The union must then act if it is to act at all.

OFFICE OF PERSONNEL MANAGEMENT (OPM). Issues **Government-wide regulations** on personnel matters that may have a substantial impact on the **scope of bargaining**; consults with labor organizations on those regulations; provides technical advice and assistance on labor-management relations matters to Federal agencies; also provides information on personnel matters to Federal agencies and the general public (e.g., this annotated glossary); exercises oversight with regard to statutory and regulatory requirements relating to personnel matters; and provides support services for the National Partnership Council.

OFFICIAL TIME. At one time treated as a term of art created by title 5, United States Code, section 7131, involving paid time for employees serving as union representatives. However, the Authority has said that section 7131(d) does not preclude parties to a collective bargaining agreement from agreeing to provide official time for other matters; that is, matters other than those relating to labor-management relations activities.

Union negotiators (no more than the number of management negotiators) who also are unit employees are statutorily entitled to official time to negotiate agreements. Official time may not, however, be used to perform internal union business. Title 5, United States Code, section 7131(d) allows the parties to negotiate the amount of official time that shall be granted to specified union representatives for the performance of specified representational functions.

OPEN PERIOD. The 45-day period (105 - 60 days prior to expiration of agreement) when the union holding exclusive recognition is subject to challenge by a rival union or by unit employees who no longer want to be represented by the union. The open period is an exception to the **contract bar** rule.

OPM. Refers to the Office of Personnel Management (OPM). OPM supports Government program managers in their personnel management responsibilities through a range of programs. This includes administering or requiring a merit system for Federal employment; providing services related to retirement, health benefits and life insurance benefits for federal employees.

ORGANIZATION. A right reserved to management. According to the FLRA, this right encompasses an agency's authority to determine its administrative and functional structure, including the relationship of personnel through lines of control and the distribution of responsibilities for delegated and assigned duties. That is, the right includes the authority to determine how the agency will structure itself to accomplish its mission and functions.

OPPOSITION TO EXCEPTION TO ARBITRATION AWARD. If a party files an exception (appeal) to an arbitrator's award, the other party may oppose the exception to the Authority in accordance with 5 CFR 2425.1. Oppositions to exceptions must be filed within thirty (30) days after the date of service of the exception.

PACKAGE BARGAINING. A negotiating technique whereby contract proposals are grouped into a "package" usually offering substantial concessions by one party, in exchange for substantial gains. Frequently, the package proposal will be advanced with the condition that it must either be accepted as presented or rejected entirely.

PANEL. See **FEDERAL SERVICE IMPASSES PANEL**.

PARTICULARIZED NEED. The Authority's analytical approach in dealing with union requests for information under title 5, United States Code, section 7114(b)(4). Under this approach, the union must establish a "particularized need" for the information and the agency must assert any countervailing interests. The Authority then balances the one against the other to determine whether a refusal to provide information is an **unfair labor practice**.

PARTNERSHIP. A form of employee participation established pursuant to Executive Order 12871 in which the parties are expected to deal with matters relating to improving *the performance of the agency* in a non-adversarial, non-litigious manner. The scope of partnership deliberations are broader than those of collective bargaining in that they usually include, e.g., deliberations over the conditions of employment of non-bargaining unit employees. Partnership deliberations also include deliberations over staffing patterns, technology, methods and means--matters integral to improving *agency* performance, which is the overriding purpose of the Order.

When President Bush signed Executive Order 13203 rescinding 12871, there was speculation that it meant the end of labor-management cooperation and communication in the Federal Government. The President was motivated by his conviction that partnership is not something that should be mandated for every agency in every situation. But while agencies are no longer required to form partnerships with their unions, they are strongly encouraged to establish cooperative labor-management relations.

Cooperation between labor and management can enhance effectiveness and efficiency, cut down the number of employment-related disputes, and improve working conditions, all of which contribute to the kind of performance and results sought by the President. This will demand management and union leaders who trust each other, who are open and honest with each other, who respect the different interests that each party brings to the table and build on the interests they share.

PAST PRACTICE (ESTABLISHED PRACTICE). Existing practices sanctioned by use and acceptance, that are not specifically included in the collective bargaining agreement. Arbitrators use evidence of past practices to interpret ambiguous contract language. In addition, past practices can be enforced under the **negotiated grievance procedure** because they are considered part of the agreement. To qualify as an enforceable established practice, the practice has to be legal, in effect for a certain period, and known and sanctioned by management.

PAST PRACTICE – CONT'D. Existing practices sanctioned by use and acceptance, which amount to terms and conditions of employment even though not specifically included in the collective bargaining agreement. In order to constitute a binding past practice, it must be established that (1) the practice must involve a condition of employment; and (2) the practice must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration. It should be noted that if a matter is not a condition of employment, it does not become a condition of employment either through practice or agreement.

PERMISSIVE SUBJECTS OF BARGAINING. There are two types of proposals dealing with so-called "permissive subjects of bargaining": proposals dealing with (1) matters covered by title 5, United States Code, section 7106(b)(1) – i.e., with staffing patterns, technology, and methods and means of performing the agency's work, and (2) matters that are not conditions of employment of bargaining unit employees. Regarding the former, it should be noted that although an agency can "elect" not to bargain on a (b)(1) matter, the President has directed heads of agencies to instruct agency management to bargain on such matters in section 2(d) of Executive Order 12871 – This directive was rescinded by Executive Order 13203.

Regarding the latter, it should be kept in mind that, apart from the statutory exclusions from the definition of **condition of employment** found in title 5, United States Code, section 7103(a)(14), a matter may be found not be a condition of employment because (1) it deals with the conditions of employment *of non-unit employees* (e.g., a proposed procedure for filling supervisory vacancies) or (2) there is no direct connection between the matter dealt with by the proposal and the work situation or employment relationship of bargaining unit employees (e.g., a proposal authorizing unit employees to hunt on a military base when off duty). Regardless of type, once agreement is reached on a permissive subject of bargaining, that agreement cannot be disapproved by the agency head, and is enforceable under the negotiated grievance procedure.

PERSONNEL BY WHICH AGENCY OPERATIONS ARE CONDUCTED. A right reserved to management by title 5, United States Code, section 7106(a)(2)(B).

PICKETING. Demonstrating, usually near the place of employment, to publicize the existence of a labor-management dispute. This is commonly called **Informational Picketing** and is directed toward advising the public about the issue in dispute. This is specifically protected by 5 U.S.C. 7116(b) so long as the picketing does not interfere with agency operations. This is not to be confused with a "strike" as Federal employees are not permitted to strike under Federal law. Informational picketing may only be conducted outside an employee's established duty hours or the employee must be in an approved leave status.

PROCEDURES. Under title 5, United States Code, section 7106(b)(2), the procedures observed by management in exercising its reserved rights are negotiable.

To qualify as a negotiable (b)(2) procedure, the proposed "procedure" must not require the use of standards that, by themselves, directly interfere with management's reserved rights or otherwise have the effect of limiting management's reserved discretion.

PROHIBITED PERSONNEL PRACTICES (SEE MERIT PRINCIPLES)

PROHIBITED SUBJECTS OF BARGAINING. Includes those matters reserved as management rights pursuant to 5 USC 7106(a).

QUESTION CONCERNING REPRESENTATION (QCR). Refers to a petition in which a union seeks to be the **exclusive representative** of an **appropriate unit** of employees, or in which employees in an existing unit want to decertify the incumbent union. The filing of such a petition is said to raise a question concerning representation--i.e., whether, and by whom, unit employees are to be represented. Such petitions are distinguished from petitions seeking to clarify the composition of existing units (e.g., whether certain individuals are in or out of the unit) or to amend the names of the parties to the exclusive bargaining relationship.

RATIFICATION. Formal approval of a newly negotiated agreement by vote of the labor organization members affected.

REOPENER CLAUSE. Provisions in the CBA specifying the conditions under which one or either party can reopen for renegotiation the agreement or designated parts of the agreement. Although some agreements provide for mutual consent reopeners, such reopeners are unnecessary as the parties can of course agree to reopen and renegotiate their agreement at any time, notwithstanding the contents of the agreement. The purpose of a reopener is to enable one party to *compel* the other party to renegotiate the provisions covered by the reopener.

REPRESENTATION ELECTION. Secret-ballot election to determine whether the employees in an appropriate unit shall have a union as their **EXCLUSIVE REPRESENTATIVE**.

REPRESENTATIONAL FUNCTIONS. Activities performed by union representatives on behalf of the employees for whom the union is the **exclusive representative** regarding their conditions of employment. It includes, among other things, negotiating and policing the terms of the agreement, attending partnership council meetings, being present at **formal discussions** and, upon employee request, ***Weingarten* examinations**.

REPRESENTATION ISSUES. Issues related to how a union gains or loses **exclusive recognition** for a bargaining unit, determining whether a proposed unit of employees is appropriate for the purposes of exclusive recognition, and determining the unit status of various employees.

REPUDIATION OF AGREEMENT. Framework developed by the FLRA to determine whether (1) the breach of the agreement was clear and patent and (2) the provision breached went to the heart of the agreement.

RETAIN EMPLOYEES. A right reserved to management. Although the rights to layoff and retain appear to be opposite sides of the same coin, the FLRA rarely mentions the right to retain when invoking the right to layoff to find nonnegotiable proposals dealing with RIF's and furloughs.

SCOPE OF BARGAINING. Matters about which the parties can negotiate. See **NEGOTIABILITY DISPUTES**.

SELECT (WITH RESPECT TO FILLING POSITIONS). The statute reserves to management the right to make selections for appointments from any appropriate source. The right to select includes discretion to determine what knowledge, skills and abilities are necessary for successful performance in the position to be filled, as well as to determine which candidates possess these qualifications.

SENIORITY. Term used to designate an employee's status relative to other employees for determining order of overtime assignments (n/a to National Guard Technicians), compensatory time assignments, vacations, etc. Straight seniority is seniority acquired solely through length of service. Departmental or shop seniority considers status factors in a particular department or shop, rather than the entire agency. A seniority list is a ranking of individual workers in order of seniority.

SHOWING OF INTEREST (SOI). The required evidence of employee interest supporting a representation petition. The SOI is 30 per cent for a petition seeking exclusive recognition; 10 per cent to intervene in the election; and 10 per cent when petitioning for dues allotment recognition. Evidence of such a showing can consist of, e.g., signed and dated authorization cards or petitions.

STAFFING PATTERNS. A short-hand expression used to refer to title 5, United States Code, section 7106(b)(1)'s long-winded reference to "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty." Under the statute, agencies can elect not to bargain on such matters.

STANDARDS OF CONDUCT FOR LABOR ORGANIZATIONS. Standards regarding internal democratic practices, fiscal responsibility, and procedures to which a union must adhere to qualify for recognition. The Department of Labor has responsibility for making known and enforcing standards of conduct for unions in the Federal and private sectors.

STEWARD (SHOP, UNION, AREA). Union representative in an organization to whom the union assigns various representational functions, such as investigating and processing grievances, representing employees, collecting dues, soliciting new members, etc. Stewards are usually fellow employees who are trained by the union to carry out these duties.

STRIKE (PROHIBITED BY STATUTE). A temporary stoppage of work by a group of employees in connection with a labor dispute. In the Federal sector, strikes are specifically prohibited by Federal law and constitute an unfair labor practice under Section 7116(b)(7) of the Federal Service Labor-Management Relations Statute. Slowdowns, sickouts and related tactics are also prohibited by the Statute.

SUBSTANCE BARGAINING. This concerns bargaining over whether an action by the agency to change to conditions of employment affecting employee working conditions will or will not be made. Substance bargaining rather than impact and implementation bargaining is required anytime the subject matter involves a condition of employment. When an agency has discretion under the law to change or not change employee working conditions, any bargaining concerning whether the change will be made requires substance bargaining (e.g. over the decision itself or over the procedures or appropriate arrangements concerning a decision already made if the matter concerns a management rights or is not a condition of employment).

SUCCESSORSHIP. Where, as the result of a reorganization, a portion of an existing unit is transferred to a gaining employer, the latter will be found to be the successor employer (thus inheriting, along with the employees, the **exclusive representative** of those employees and the collective bargaining agreement that applied to those employees) if: (a) the post-transfer unit is appropriate, (b) the transferred bargaining unit employees are a majority in the post-transfer unit, (c) the gaining employer has "substantially" the same mission as the losing employer, (d) the transferred employees perform "substantially" the same duties under "substantially" similar working conditions in the gaining entity, and (e) it is not demonstrated that an election is necessary to determine representation.

SUPERVISOR. Under title 5, United States Code, section 7103(a)(10), a supervisor is "an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority[.]" The individual need exercise only one of the indicia of supervisory authority, not a majority of them, to qualify as a supervisor for the purposes of the statute, provided it involves the consistent exercise of independent judgment.

UNFAIR LABOR PRACTICE (ULP). A violation of any of the provisions of the Federal Service Labor-Management Relations Statute. It is a term of art that is narrower in scope than the misleading adjective "unfair" suggests. ULP *charges* are filed with the Authority by an individual, a union, or an employer. They are investigated by the General Counsel who issues a ULP *complaint* if the General Counsel concludes the charge(s) have merit, and who prosecutes the matter before an Administrative Law Judge in a fact-finding hearing and before the Authority, which decides the matter.

The most common agency ULPs are **duty-to-bargain** ULPs (usually a failure to give the union notice of proposed changes in conditions of employment and/or engage in impact and implementation bargaining), **formal discussion** ULPs, ***Weingarten*** ULPs, and failure-to-provide-**information** ULPs. The most common ULP committed by a union is a failure to fairly represent (see **fair representation**) all unit members without regard to union membership.

ULP BAR. A claim by either party to a collective bargaining relationship that a grievance was previously filed involving the same facts and theories alleged in a subsequently filed ULP.

UNILATERAL ACTION. Implementation of management decisions concerning personnel policies and matters affecting working conditions without providing the union advance notice of such changes in working conditions and an opportunity to negotiate to the extent permitted by law.

UNION. A labor organization "composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment…"

UNION-INITIATED MIDTERM BARGAINING ON NEW MATTERS. Absent a bargaining waiver, the union has the right to initiate, during the life of the existing agreement, bargaining on matters not **"covered by"** the agreement. There is a split in the circuits, which the Supreme Court has agreed to resolve, regarding this statutory right, with the D.C. Circuit holding that the union has such a right (see *NTEU v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987), and the Fourth Circuit holding that it does not (see *SSA v. FLRA*, 956 F.2d 1280 (4th Cir. 1992). Also see *Dept. of Energy v. FLRA*, Nos. 95-2949 and -3113 (4th Cir. Feb. 13, 1997), where the 4th Circuit went further and held that the FSLMRS *prohibits* such bargaining: consequently, such a right could not be established by collective bargaining agreement.

UNIT. See **APPROPRIATE UNIT**.

UNIT CONSOLIDATION. A no-risk procedure for combining existing units into one or more larger appropriate units.

UNIT DETERMINATION ELECTION. When (a) several petitioners seek to represent different parts of an agency, (b) the proposed units overlap, and (c) the FLRA finds that more than one of the proposed units are appropriate, it lets the employees vote for units as well as unions.

WAIVER. An agreement reached between union and management whereby one party voluntarily gives up rights afforded to it. For waivers to be enforceable, they must be "clear and unmistakable." It should be noted that management cannot waive rights afforded to management under 5 U.S.C. 7106(a).

WAIVER DOCTRINE. A waiver of bargaining rights may be established by an expressed agreement or bargaining history. Further, any such waiver must be clear and unmistakable.

- **Expressed Agreement** - A union may contractually agree to waive its right to initiate bargaining in general by a "zipper clause," that is, a clause intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement or by specifying a particular subject matter that is precluded from further bargaining during the term of the agreement.

- **Clear and Unmistakable** - A waiver may also be evidenced by bargaining history when the subject of mid-term bargaining concerns matters which were discussed in contract negotiations but which were not specifically covered in the resulting contract. In this category, waiver may be found where the subject matter of the proposal offered by the union during mid-term negotiations was fully discussed and explored by the parties at the bargaining table. For example, where a union sought to bargain over a subject matter but later withdrew its proposal in exchange for another provision, a waiver of the union's right to bargain over the subject matter that was withdrawn would be found. The particular words of proposals offered during contract and mid-term negotiations need not be identical for a waiver to exist. In determining whether a contract provision constitutes a clear and unmistakable waiver, the Authority examines the wording of the provision at issue as well as other relevant provisions of the contract, bargaining history, and past practice.

***WEINGARTEN* RIGHT / EXAMINATIONS**. Under title 5, United States Code, section 7114(a)(2)(B), an employee being examined in an investigation (an investigatory examination or interview) is entitled to union representation if:

(1) the examination is conducted by a representative of the agency,
(2) the employee reasonably believes that the examination may result in disciplinary action, and
(3) the employees asks for representation.

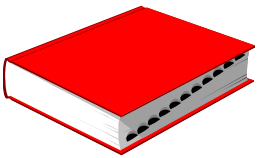
Such examinations are called *Weingarten* examinations because Congress, in establishing this right, specifically referred to the private sector case establishing such a right. Each agency has the obligation to post Weingarten rights annually either through common bulletin boards or web posting through a commonly accessed employee web page.

Also defined as a *Weingarten Meeting* whereby an exclusive representative "shall be given the opportunity to be represented at any examination" of a unit employee by an agency representative in connection with an investigation if the employee reasonably believes that discipline may result from the examination and requests representation. An employee who is questioned during an investigatory examination that may result in discipline "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. Thus, the union representative must be free to help clarify the issues or facts, or to suggest other employees who may have knowledge of them.

WORK STOPPAGE CONTINGENCY PLAN. IAW 5 USC 7116(b)(7), it shall be an unfair labor practice for a labor organization to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or to condone any activity by failing to take action to prevent or stop such activity. This statute prohibits Federal employees from striking against the Government of the United States. Employees can be disciplined for engaging in such action. Informational picketing, which does not disrupt Agency operations or prevent public access to a facility, is not prohibited. The agency headquarters shall be immediately notified when prohibited acts take place. All states should have a Work Stoppage Contingency Plan. This plan is for official use only and is available on a need-to-know basis to those individuals directly involved in developing or implementing it. Review and update the plan biennially and, following any concerted activity, revise as needed.

WORKING CONDITIONS. The existing environment in which employees perform their duties. This includes such things as access to and from the facility, beginning at the entrance to the grounds, the type of equipment used and surroundings they are accustomed to (e.g. ceilings, walls, paint, carpet, temperature, lighting, services such as coffee, popcorn, and snacks, rules, relations and procedures relating to any employee activity, rights or benefit (e.g. schedules, breaks, training, discipline, conduct and performance standard, attire, parking, entertainment), etc. Any action taken which changes a right, benefit, privilege, etc. currently enjoyed by employees is a change in working conditions. However, changes in working conditions may or may not be subject to negotiation. See Conditions or Employment.

ZIPPER CLAUSE. An agreement provision specifically barring any attempt to reopen negotiations during the terms of the agreement. [For a related term, see **Reopening Clause**.]



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MERIT PRINCIPLES AND PROHIBITED PERSONNEL PRACTICES…

Merit System Principles

Section 2301 (b) of Title 5, USC, states that Federal personnel management should be implemented consistent with the following merit principles:

1. Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills after fair and open competition which assures that all receive equal opportunity.
2. All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age or handicapping condition, and with proper regard for their privacy and constitutional rights.
3. Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.
4. All employees should maintain high standards of integrity, conduct and concern for the public interest.
5. The Federal workforce should be used efficiently and effectively.
6. Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve performance to meet required standards.
7. Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.
8. Employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes and prohibited from using their official authority or influence for purposes of interfering with or affecting the result of an election or a nomination for election.
9. Employees should be protected against reprisal for the lawful disclosure of information which the employee reasonably believes evidences a violation of any law, rule or regulation, mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety.

Prohibited Personnel Practices

Section 2302(b) of Title 5, USC states that any employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority:

1. Discriminate for or against any employee or applicant for employment
    A. On the basis of race, color, religion, sex or national origin as prohibited under section 717 of the Civil Rights Act of 1964
    B. On the basis of age as prohibited under sections 12 and 15 of the Age Discrimination Act of 1967
    C. On the basis of sex as prohibited under section 6(d) of the FLSA of 1938
    D. On the basis of handicapping condition as prohibited under section 501 of the Rehabilitation Act of 1973
    E. On the basis of marital status or political affiliation as prohibited under any law, rule or regulation.
2. Solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action except as provided under section 3303(f).
3. Coerce the political activity of any persons (including the providing of any political contribution or service) or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.
4. Deceive or willfully obstruct any person with respect to such person's right to compete for employment.
5. Influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.
6. Grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements of any position) for the purpose of improving or injuring the prospects of any particular person for employment.
7. Appoint, employ, promote, advance or advocate for appointment, employment, promotion or advancement in or to a civilian position any individual who is a relative (as defined by section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which the employee exercises jurisdiction or control as such an official.
8. Take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of

A. Any disclosure of information by an employee or applicant which employee or applicant reasonably believes evidences a violation of law, rule or regulation or gross mismanagement, abuse of authority, or a substantial and specific danger to public health and safety if such disclosure is not specifically prohibited by law or Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

B. Any disclosure to the special counsel, or to the Inspector General of any agency or another employee designated by the head of the agency to receive such disclosures, or information which the employee or applicant reasonably evidences a violation of any law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse or authority or a substantial and specific danger to the public health or safety.

9. Take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of

   A. The exercise of any appeal, complaint or grievance right granted by any law, rule or regulation

   B. Testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to subparagraph (A);

   C. Cooperating with or disclosing information to the IG or an agency, or the Special Counsel, in accordance with any applicable law;

   D. For refusing to obey an order that would require the individual to violate a law.

10. Discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others, except that nothing in this paragraph shall prohibit an agency from taking into account in determining suit-ability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia or of the U.S.

11. Take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule or regulation implementing or directly concerning the merit systems principles contained in section 3201 of this title.

12. Knowingly take or fail to take a personnel action if that action or failure to act would violate a statutory or regulatory veteran's preference requirement.

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"UNFETTERED" – AN EXAMPLE OF CASE LAW…

Note: This decision from the D.C. Court of Appeals upheld the National Guard's position that The Adjutant General, through the service secretaries, has the "unfettered" authority to set work schedules and hours. The Court went further to say that the specific (The Technician Act) trumps the general (The Schedules Act), and ruled in favor of the National Guard. This is also an excellent example of the Court's understanding of the Technician Act of 1968 and the structure and function of the National Guard…

ILLINOIS NATIONAL GUARD, PETITIONER v. FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, INTERVENOR; WYOMING AIR NATIONAL GUARD and DEPARTMENT OF DEFENSE, PETITIONERS v. FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT; CALIFORNIA NATIONAL GUARD and DEPARTMENT OF DEFENSE, PETITIONERS v. FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

Nos. 87-1290, 87-1345, 87-1346

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

272 U.S. App. D.C. 187; 854 F.2d 1396; 1988 U.S. App. LEXIS 11457; 129 L.R.R.M. 2422

April 15, 1988, Argued
August 19, 1988, Decided

PRIOR HISTORY:
[**1] Petition for Review of an Order of the Federal Labor Relations Authority.

COUNSEL: Joseph R. Reyna, Attorney, National Guard Bureau, with whom John R. Bolton, Assistant Attorney General, Richard K. Willard, Assistant Attorney General, * William Kanter, Sandra Wien Simon, Attorneys, Department of Justice and James C. Hise, Attorney, National Guard Bureau, were on the brief, for Petitioners/Cross Respondents.

* At time initial brief was filed.

James F. Blandford, Attorney, Federal Labor Relations Authority, with whom Ruth E. Peters, Solicitor, William E. Persina, Deputy Solicitor and Arthur A. Horowitz, Associate Solicitor, Federal Labor Relations Authority, were on the brief, for Respondent/Cross-Petitioner. Susan Berk, Attorney, Federal Labor Relations Authority, also entered an appearance for Respondent/Cross-Petitioner.

H. Stephen Gordon and Bruce P. Heppen were on the brief for Intervenor, National Federation of Federal Employees. Alice L. Bodley also entered an appearance for Intervenor, National Federation of Federal Employees.

JUDGES: Ruth B. Ginsburg, Buckley, and D. H. Ginsburg, Circuit Judges.

OPINION BY: GINSBURG [*1397] D. H. GINSBURG, Circuit [**2] Judge:

The Federal Labor Relations Authority (FLRA) held that, under the Federal Employees Federal and Compressed Work Schedules Act of 1982 (Schedules Act), the National Guards of three states must bargain with certain of their full-time employees over the establishment of compressed work schedules.

The Guards, joined by the Department of Defense, petition for review, arguing that the National Guard Technician Act (Technician Act) exempts them from the bargaining requirements of the Schedules Act; the FLRA cross-petitions to enforce its orders. We conclude that Congress intended for the Technician Act, rather than the Schedules Act, to control in this situation, and hence we grant the petitions for review and deny the FLRA's cross-petitions for enforcement.

I. BACKGROUND
A. The National Guard

The National Guard is the modern Militia reserved to the states by Art. I § 8, cl. 15, 16 of the Constitution. Maryland v. United [*1398] States, 381 U.S. 41, 46, 85 S. Ct. 1293, 14 L. Ed. 2d 205 (1965). It occupies a unique position in our country's federal structure: the day-to-day operation of National Guard units remains under the control of the states, but since passage of the National Defense Act of 1916, 39 Stat. 166, [**3] the Guard has been armed and funded by the federal government, and trained in accordance with federal standards. Pursuant to the 1916 law, as amended in 1933, the National Guard is also part of the United States Army Reserve, and officers of the Guard receive corresponding commissions in the Army Reserve Corps. Thus, it is "an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war," and it "also may be federalized in addition to its role under state governments, to assist in controlling civil disorders." Gilligan v. Morgan, 413 U.S. 1, 7, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973).

The status of National Guard employees, like that of the Guard itself, is unusual and somewhat complex. In addition to its part-time, purely military personnel, the Guard employs full-time civilian workers, known as National Guard technicians, who "meet the day-to-day administrative, training, and logistic needs of the Guard." Simpson v. United States, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979). While many of their duties are similar to those of employees who work in a typical civilian setting, technicians traditionally have been required to be members of their state National [**4] Guard units, and must perform even their civilian tasks "in a distinctly military context, implicating significant military concerns." New Jersey Air National Guard v. FLRA, 677 F.2d 276, 279 (3d Cir. 1982) ("New Jersey Guard").

Although National Guard technicians have been paid with federal funds for over 70 years, they were not federal employees until 1968, when Congress enacted the National Guard Technician Act, Pub. L. No. 90-486, 82 Stat. 755 (codified as amended at 32 U.S.C. §§ 709, 715 (1982)). That Act grants technicians federal employee status "for the limited purpose of making fringe and retirement benefits of federal employees and coverage under the Federal Tort Claims Act . . . available to National Guard technician employees of the various states." American Federation of Government Employees Local 2953 v. FLRA, 235 U.S. App. D.C. 104, 730 F.2d 1534, 1537 (D.C.Cir. 1984). The Technician Act codifies the requirement that technicians be members of their state National Guard units and hold military grades that correspond to their civilian positions, 32 U.S.C. § 709(b) (1982), and also vests the adjutants general of the various states with final discretion over most matters relating [**5] to their employment and termination. Id. at § 709(e). Thus, the employment status of National Guard technicians is a hybrid, both of federal and state, and of civilian and military strains.

Because of their unique status, the Technician Act specifically exempts Guard technicians from several other provisions of title 5 of the U.S. Code that apply to the vast majority of federal government employees. For example, technicians who are fired or suspended from the Guard may not avail themselves of the appeals procedure set forth in section 7513. Id. at § 709(f). Nor does the veterans' preference provided for in sections 2108 and 3502 have any bearing on the selection of National Guard technicians. Id. Most significantly for present purposes, the Technician Act also exempts Guard technicians from the hours of work limitation of section 6101(a), and the overtime pay requirements of section 5544(a). Id. at § 709(g).

B. The Work Schedules Act

In 1978, having found that "trends in the usage of 4-day weeks, flexible hours, and other variations in the workday and workweek in the private sector appear to show sufficient promise to warrant . . . experimentation" by the federal [**6] government, Congress authorized federal agencies to experiment with flexible and compressed work schedules (referred to collectively as alternative work schedules) over a three-year period. Work Schedules Act of 1978, Pub. L. No. 95-390, 92 Stat. 755 (codified as amended at 5 U.S.C. § 6101 note (1982)). Compressed schedules usually involve a [*1399] workweek of four 10-hour days or a fortnight of eight 9-hour days and one 8-hour day. Employees with flexible schedules work five 8-hour days per week, but may stagger their arrival and departure times in order to avoid rush hour traffic or to accommodate other personal preferences.

Although Congress found, at the end of the test period, that "improper use of alternative work schedules did have some serious repercussions," including increased costs and decreased productivity, it concluded that "the benefits of these schedules to employees were overwhelming," and that "the benefits of these schedules to government, when utilized in a proper fashion, were also significant." S. Rep. No. 365, 97th Cong., 2d Sess. 4 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News at 565, 566. Accordingly, in 1982 Congress passed the Schedules Act, which [**7] extended the program, and in 1985 made it permanent. 5 U.S.C. § 6101 note (Supp. IV 1986).

The Schedules Act provides that if the employees of an agency are represented by an exclusive bargaining representative, i.e., a union, then the agency must bargain with it over the establishment or the termination of any alternative work schedule. 5 U.S.C. § 6130(a) (1982). If there is no union, the agency cannot impose a compressed work schedule (although it may apparently impose a flexible schedule) without the approval of a majority of the affected employees. Id. at § 6127(b)(1). If the union proposes a compressed schedule that the agency believes will affect it adversely, and the parties bargain to impasse over the issue, then the dispute is referred to the Federal Service Impasses Panel (FSIP), which is required to impose the union's proposed schedule unless the agency shows that it would have an adverse impact on the agency's productivity, output, or costs. Id. at § 6131.

C. The Proceedings Below

In 1986, during contract negotiations between the Illinois National Guard and the union representing its technicians, the union submitted a proposal that would allow the technicians, [**8] at their individual election, to work a compressed schedule of four 10-hour days a week. The Guard took the position that the proposal was non-negotiable, and the union appealed to the FLRA pursuant to section 7117 of the Federal Service Labor-Management Relations Statute (the Federal Labor Act). See 5 U.S.C. § 7117 (1982). Before the FLRA, the Guard argued that section 709(g) of the Technician Act, which provides that the Secretary of the Army "may prescribe the hours of duty" for technicians "notwithstanding . . . any other provision of law," grants it unfettered discretion to establish their work schedules and is therefore inconsistent with the bargaining requirement of the Schedules Act. Alternatively, the Guard argued that the proposal was nonnegotiable because it would interfere with reserved management rights, and because it was inconsistent with a regulation for which the Guard has a compelling need. See id. at §§ 7106, 7117.

The FLRA held that the Guard was required to bargain over the proposal. It first noted that the Schedules Act defines the "employees" to which it applies by reference to the general definition of employee in section 2105 of title 5, which includes [**9] National Guard technicians.
Addressing the Guard's claim that the Schedules Act and the Technician Act are inconsistent, the FLRA reasoned that even if there were a "limited conflict" between the two statutes, inasmuch as the former requires premium pay for overtime work and the

latter prohibits it, the statutes were otherwise capable of being applied together. Specifically, it said that although the Technician Act gives the Guard "authority" to establish irregular work hours for technicians "notwithstanding any other provision of law," it did not give the Guard "exclusive" authority to establish their work schedules. "Thus," the FLRA concluded, "the [Guard] is not deprived of that authority by being required to exercise it through the procedures and under the limitations of the Work Schedules Act."

The FLRA also rejected the claim that the duty to bargain over work schedules could undermine the Guard's ability to perform [*1400] its military role, complacently noting that where the Guard "demonstrates to the satisfaction of the [FSIP] that an alternate work schedule will have, or is having, an adverse impact, it will not be required to implement that schedule." Finally, the FLRA disposed [**10] of the Guard's management rights and compelling need claims under the Federal Labor Act by reference to its then-recent decision in American Federation of Government Employees, Local 1934, and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, 23 F.L.R.A. 872 (1986), where it held that the Schedules Act makes any proposal over an alternative work schedule "fully negotiable," subject only to an FSIP determination that it would have an adverse impact on the agency's productivity et cetera.

While the Illinois case was pending before the FLRA, unions negotiating with National Guard units in Wyoming and California also submitted proposals regarding compressed work schedules for technicians. In each case, the Guard refused to bargain, and the unions filed negotiability appeals to the FLRA. Relying on its decision in the Illinois case, the FLRA found the proposals in both cases to be negotiable, and ordered the Guards to bargain over them.

In each of the three cases, the Guard, joined by the United States Department of Defense, has filed petitions for review, and the FLRA has cross-filed for enforcement of its orders. The National Federation of Federal Employees intervened [**11] in the Illinois case in support of the FLRA. We consolidated the three cases for the purposes of this appeal.

II. ANALYSIS

A. Standard of Review

As we recently noted, "under the law of this circuit, when an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference." Department of the Treasury v. FLRA, 267 U.S. App. D.C. 160, 837 F.2d 1163, 1167 (D.C.Cir. 1988); see also, INS v. FLRA, 228 U.S. App. D.C. 285, 709 F.2d 724, 729 n. 21 (D.C.Cir. 1983). In this case, the FLRA was called upon to resolve an apparent conflict between two statutes, the Schedules Act and the Technician Act, neither of which it is charged with administering. Cf. Colorado Nurses Association v. FLRA, 271 U.S.App.D.C. 259, 851 F.2d 1486, slip op. at 5 (1988) (no deference owed to FLRA's reconciliation of its organic statute with a statute not within its area of expertise); New Jersey Guard, 677 F.2d at 282 n.6. ("We are not obliged to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the [Technician Act and the Federal Labor Act]"). Therefore, while we follow the FLRA's reasoning "to the extent that we deem is sound," [**12] Department of the Treasury, 837 F.2d at 1167, we review the FLRA's decision in this case de novo.

B. Statutory Construction

Our path through the statutory maze in this case is considerably easier for the footprints left by Judge Adams in the New Jersey Guard case. In that case, the technicians' union submitted a proposal that would have allowed aggrieved employees to challenge, in binding arbitration, disciplinary actions taken by the state adjutant general.

Although the Federal Labor Act expressly provides that such a proposal is within the duty to bargain, and appears to apply by its terms to Guard technicians as employees of an "Executive agency," the New Jersey Guard declared the proposal nonnegotiable. Although the Technician Act predates the Federal Labor Act, the New Jersey National Guard took the position that it continued to commit such actions to the administratively unreviewable discretion of the state adjutant general.

The FLRA found that the two statutes involved in that case could "be harmonized if they are seen as creating alternative routes . . . by which a grievant can raise his claims," 677 F.2d at 282, and ordered the Guard to bargain over the [**13] proposal. Its holding, restated in the language it has used in this case, was that although the adjutant general had "authority" to review employee grievances, he did not have "exclusive authority." On review, the Third Circuit acknowledged that, when faced with "two statutes that are in apparent [*1401] conflict," the duty of the court is to harmonize them if it can. Id. The court, however, was unable to agree with the FLRA's reading of the Technician Act, inasmuch as the subject matter of the union's proposals was "explicitly committed to the discretion of the adjutant general" by that Act. Id. at 280. Therefore, it noted, the FLRA's "accommodation" was "no accommodation at all; rather, it is a negation of the Technician Act." Id. at 282.

Having found that there was indeed a conflict between the two statutes, the court went on to consider "whether Congress intended the specific provisions of the 1968 Technician Act or the more general provisions of the 1978 [Federal Labor Act] to govern" the resolution of the case. Id. at 283.

After considering "the language of the statutes themselves, the legislative history underlying each Act, and the apparent or inferable purposes that [**14] each Act reflects," id., the court determined that the terms of the Technician Act had continuing vitality despite the contrary provision of the Federal Labor Act, and reversed the FLRA's order to bargain. "To do otherwise," it concluded, "would permit a subtle subversion of a clear congressional intent." Id. at 286.

Our first task, then, is to determine whether, as the Guard argues, the Technician Act-disregarding for the moment the effect of the Schedules Act-grants the Secretary of the Army unfettered discretion to establish the work hours of National Guard technicians. If, as the FLRA contends, it does not, then there is no conflict between the statutes, and no plausible argument for excepting the Guard from the bargaining requirement of the Schedules Act.

1. Grant of Discretion Under the Technician Act

Section 709(g)(2) of the Technician Act, in relevant part, provides:

Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may . . . prescribe the hours of duty for technicians. Notwithstanding section 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted [**15] an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(Emphases added.) Not surprisingly, the parties would have us focus on different portions of this provision. The Guard repeatedly directs our attention to the prosaic "notwithstanding . . . any other provision of law." Meanwhile, the FLRA finds significance in the mosaic of "may" and "shall": although technicians shall be granted compensatory time off and shall not be paid a premium for overtime, the statute provides only that the Secretary may, not that he shall, prescribe the hours of duty for technicians. According to the FLRA, this distinction means that the Secretary's authority to prescribe work schedules is "discretionary" rather than "mandatory"; and because the Guard "is obligated to bargain to the extent of its discretion," it argues, the work schedule proposals are negotiable.

It also contends that the distinction between "may" and "shall" distinguishes this case from New Jersey Guard, and from Wright v. Alabama Army National Guard, 437 F. [**16] Supp. 54 (M.D. Ala. 1977), aff'd, 605 F.2d 943 (5th Cir. 1979) (on the basis of the district court's decision).

In Wright, the court held that although the Technician Act predated Public Law 93-259, which brought the Guard within the definitional coverage of the Fair Labor Standards Act (FLSA), it continued to exempt the Guard from the overtime pay provisions of the FLSA. As the FLRA correctly points out, in Wright, the relevant statutory language provided that "notwithstanding . . . any other provision of law," technicians "shall not be entitled" to overtime pay. In New Jersey Guard, however, in finding that the union's proposals would impinge upon the discretion vested in the state adjutant general by the Technician Act, the court relied on two of the Act's provisions: section 709(e)(3), which provides that, notwithstanding any [*1402] other provision of law, the state adjutant general "may" discharge any technician for cause; and section 709(e)(5), which provides (again, "notwithstanding any other provision of law") that any appeal from such a discharge "shall not extend beyond the adjutant general." 677 F.2d at 280. The court in that case did not distinguish between [**17] the "discretionary" and the "mandatory" language, however. Nor do we in this one; it is a distinction in search of significance.

The question, at this point in our analysis, is not whether the Secretary's authority under the Technician Act is mandatory or discretionary, but whether that Act, standing alone, commits decisions regarding technicians' work schedules to the Secretary's unfettered discretion. We believe that it does. The Act requires the Secretary to grant compensatory time for overtime work, prohibits him from paying overtime pay, and allows him to "prescribe the hours of duty for technicians," all "notwithstanding any other provision of law." Clearly, the Technician Act does not require him unilaterally to prescribe work schedules. Because the Guard was never bound by the workday and workweek limitations in section 6101, the Secretary (or those to whom he delegated his authority under the Act) presumably could have bargained over hours of work even before the enactment of the Schedules Act. That choice, however, notwithstanding any other provision of law, is his alone.

Although the "notwithstanding" language of the statute really could not be clearer, we stoop to note [**18] that our view of section 709(g) also finds support in the legislative history of the Technician Act. The House committee report on the bill states:

This bill provides that the Secretary . . . may prescribe the hours of duty for all technicians. . . . This authority will continue the existing practice regarding hours of work and compensatory time off. It is the firm view of the committee that the irregular hours of work to which technicians are subjected on frequent occasions make it impractical, both from the standpoint of the Government and the individual, to be limited to the normal provisions regarding a straight 40-hour week with overtime or differential pay for additional hours of work. The frequent irregular hours are inherent in the technician job and position.

H.R. Rep. No. 1823, 90th Cong., 2d Sess. 13, reprinted in 1968 U.S. Code Cong. & Ad. News, 3318, 3336. Thus, Congress recognized that the very nature of the technicians' job, with their dual civilian and military responsibilities, often requires that they be "subjected" to irregular work hours. The Technician Act therefore authorizes the Secretary of the Army to "prescribe" their hours of duty "notwithstanding. [**19] . . any other provision of law."

In the face of the statute and its legislative history, the FLRA says: "Read in context, the reference to 'any other laws' concerns laws of the same sort, i.e., laws which would restrict the agency from prescribing hours other than the standard schedule of five 8-hour days." Otherwise, it argues, the references to specific statutory provisions would be superfluous. While it is not clear to us that the Schedules Act would not in any event be a law "of the same sort," we decline the FLRA's creative invitation to limit the unambiguous language of the statute.

2. Resolution of Conflicting Statutory Provisions

Since, as an initial matter, section 709(g) of the Technician Act committed the establishment of work schedules to the unfettered discretion of the Secretary, the next question is whether that provision was implicitly repealed or confined by the subsequent enactment of the Schedules Act, which requires bargaining over work schedules. In other words, having found that there is indeed a conflict between the two statutes, we must decide "whether Congress intended the specific provisions of the 1968 Technician Act or the more general provisions of [**20] the [1982 Schedules Act] to govern" its resolution. New Jersey Guard, 677 F.2d at 283; see also Colorado Nurses, slip op. at 4-5.

[*1403] At this stage of our analysis, we return again to the reasoning of the court in New Jersey Guard:

Looking first to the statutory language, we immediately confront the preface to section 709(e) of the Technician Act, which explicitly provides that its terms apply "Notwithstanding any other provision of law . . ." [emphasis added]. A clearer statement is difficult to imagine: section 709(e) must be read to override any conflicting provision of law in existence at the time that the Technician Act was enacted. Application of this statement is less certain, however, with respect to a statute such as the Labor-Management Act, adopted after the Technician Act. The drafters of section 709(e) can hardly be said to have had the Labor-Management Act specifically within their contemplation. Even so, the preemptive language is powerful evidence that Congress did not intend any other, more general, legislation, whenever enacted, to qualify the authority of the state adjutants general as set out in the Technician Act. The language does not preclude [**21] a subsequent change of heart on the part of Congress, but it does suggest that any qualification of the terms of section 709(e) would be accepted by Congress only after some consideration of the factors requiring or permitting such a change.

677 F.2d at 283. Clearly, the Third Circuit's reasoning is equally applicable to this case; we need only to substitute "section 709(g)" for "section 709(e)," "Schedules Act" for "Labor-Management Act," and the "Secretary of the Army" for the "state adjutants general," and our position in this case is identical.

We turn, therefore, to determine whether there is evidence that Congress specifically considered the possibility, in the Schedules Act, of curtailing the Secretary's discretion, under the Technician Act, over the work schedules of Guard technicians. The most persuasive evidence that it did is found in the definition section of the later statute. Although the Schedules Act itself does not specifically define the term employee, it adopts by reference the general definition of "employee" in section 2105 of title 5, which provides:

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically [**22] modified, means . . . an individual who is-

(1) appointed in the civil service by one of the following acting in an official capacity- . . . .

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32 [the Technician Act].

In this case, then, as in New Jersey Guard and Wright, National Guard technicians come within the definition of a subsequently enacted statute that appears to conflict with the Technician Act.

In New Jersey Guard, the conflict was with the Federal Labor Act, which extends, as we have seen, to employees of "Executive agenc[ies]." 5 U.S.C. § 7103(a) (2)-(3). The Technician Act establishes Guard technicians as employees of the Departments of the Army and the Air Force, firmly within the Executive Branch.

See U.S. Const. art. II, § 2, cl. 1; New Jersey Guard, 677 F.2d at 281 n.5. Although the Federal Labor Act exempts several named agencies, not including the Guard, the court held that insofar as it conflicted with the Technician Act, the Federal Labor Act implicitly exempted the Guard from its coverage. In Wright, the conflict was with the FLSA, which was amended in 1974 specifically to cover "any [**23] individual employed . . . as a civilian in the military departments." The court, still, was not persuaded that Congress had intended implicitly to repeal the inconsistent provision of the Technician Act.

To be sure, the definition in this case is arguably a better indicator of Congress's specific intent, inasmuch as it makes an express reference to the Technician Act. The reference, however, is indirect, if not oblique: the Schedules Act itself refers only to the broad, general definition of employee in title 5, which in turn refers to persons appointed by "an adjutant general [*1404] designated by the Secretary concerned under section 709(c) of title 32." We recognize that the legal effect of a provision incorporated by reference ordinarily is no different from that of a provision actually set forth in a statute. Here, however, we are looking for an indication that Congress had the National Guard in contemplation when it enacted the Schedules Act; and the incorporation of Guard technicians by a reference once removed is simply less telling evidence that Congress considered the Guard's unique situation than would be a specific inclusion of technicians eo nomine in the Schedules Act itself. [**24]

In addition to the conflict between section 709(g) of the Technician Act and the bargaining requirement of the Schedules Act, there is a second inconsistency between the two statutes suggesting that Congress did not have the Guard in mind when it enacted the Schedules Act. As we have mentioned, section 709(g) of the Technician Act clearly prohibits the Secretary from paying a premium to Guard technicians for overtime work. With equal clarity, however, the Schedules Act establishes methods for computing premium pay for employees working under alternative work schedules, 5 U.S.C. §§ 6123, 6128, and prohibits agencies from agreeing to an alternative work schedule program "which contains premium pay provisions which are inconsistent with [the method set forth in the Schedules Act]." Id. at § 6130(b). Thus, if the Guard establishes an alternative work schedule through collective bargaining, and pays overtime compensation to employees working under that schedule, it violates the clear command of the Technician Act; if it establishes an alternative work schedule but, absent an employee's request for compensatory time off in lieu of payment, see 5 U.S.C. § 5543, does not pay such [**25] compensation, it violates the equally clear command of the Schedules Act. We need not decide today, of course, which of the two provisions would be controlling. n1 Rather, the point is only that such an evident contradiction strongly suggests that Congress did not specifically consider the Technician Act, and the unusual employment status of Guard technicians, when it enacted the Schedules Act.

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n1 Pointing to the two inconsistencies between the Schedules Act and the Technician Act, the Guard contends that it is exempt from the Schedules Act altogether. The only issue before us in this case, however, is whether the Guard is subject to the bargaining requirement of the Schedules Act, and that is the only issue we decide in this case.

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Moreover, neither the FLRA nor the intervenor has directed us to anything counter-indicative in the legislative history of the Schedules Act. n2 Borrowing and again adapting the language of New Jersey Guard, "there is no reference to the unique state-federal status of those employees; no recognition of any military aspects to the employment of National Guard technicians. In short, we can find no evidence whatsoever that Congress . . . had within [**26] its contemplation the employment status of National Guard technicians [when it enacted the Schedules Act]." 677 F.2d at 285.

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n2 Both the FLRA and the Intervenor do point to a separate bill relating to membership of military personnel in labor organizations that was before Congress in 1978 (the same year the initial version of the Schedules Act was enacted) as evidence that "Congress was specifically aware of issues concerning the labor relations status of technicians" while it was considering the Schedules Act. The Senate version of the bill would have denied technicians the right to collective bargaining altogether. After discussion in committee, however, that portion of the bill was rejected. H.R. Rep. No. 894, Part 2, 95th Cong., 2d Sess. 6-7, reprinted in 1978 U.S. Code Cong. & Ad. News 7575, 7590. See also 10 U.S.C. § 976 (1982).

This evidence ill-serves the FLRA in this case, however. As the court in New Jersey Guard noted, the legislative history of that bill provides an example of the attention that one would expect to find if Congress had intended to modify the provisions of the Technician Act. The history of the military labor organization bill constitutes additional evidence that Congress, even in 1978, considered the status of National Guard technicians to be of sufficient consequence to merit discussion and careful consideration before being modified.

677 F.2d at 285 n. 8.

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[**27]

Therefore, the FLRA "encounter[s] head-on the 'cardinal rule . . . that repeals by implication are not favored.'" Morton v. [*1405] Mancari, 417 U.S. 535, 549, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974) (quoting Posadas v. National City Bank, 296 U.S. 497, 503, 80 L. Ed. 351, 56 S. Ct. 349 (1936)). The force of this rule is greater still when it is urged that a specific statute has been repealed by a later but more general one. See Colorado Nurses, slip op. at 12-13. For, as the Supreme Court stated in Bulova Watch Co. v. United States, 365 U.S. 753, 758, 6 L. Ed. 2d 72, 81 S. Ct. 864 (1961) (quoting Townsend v. Little, 109 U.S. 504, 512, 27 L. Ed. 1012, 3 S. Ct. 357 (1883)), "it is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'" The Third Circuit applied this principle to the facts in New Jersey Guard as follows:

Congress in 1968 [in the Technician Act] turned its attention to the very class of federal employees involved in this dispute. It crafted with care precise provisions intended to meet concerns of federalism and military control that are duplicated nowhere else in the federal service. . . . One can only infer from this narrowly directed activity that Congress, upon consideration of the issue in dispute here . . . decided [**28] that very matter, with explicit and specific language, in 1968. Turning to the [later] legislation, we are met with a statute addressing the employment concerns of all federal employees. . . . It appears inconceivable that Congress . . . without a moment's thought as to the question of state control over the National Guard, or as to the needs of military discipline over Guard technicians in their dual status as civilian and military personnel, intended to eliminate, by mere implication, the controls that Congress carefully had imposed over those employees . . . years earlier.

677 F.2d at 285-86; see also AFGE Local 2953, 730 F.2d at 1546-47.

Faced, as we are, with two conflicting statutes, we must do our best to harmonize them. Here, that harmony can be achieved only by reading the Technician Act as preserving a narrow exception to the broadly applicable bargaining requirement of the Schedules Act. n3

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n3 Because we find that, notwithstanding the Schedules Act, the Technician Act continues to commit the establishment of technicians' work schedules to the discretion of the Secretary, we need not address the Guard's alternative argument that the FLRA improperly refused to consider its negotiability objections under the management rights and compelling need sections of the Federal Labor Act.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[**29]

III. CONCLUSION

Section 709(g) of the Technician Act, when it was enacted in 1968, gave the Secretary of the Army **unfettered discretion to "prescribe the hours of duty"** for National Guard technicians. Because we are unable to find any indication in the Schedules Act that Congress intended to limit that discretion, we cannot conclude that the bargaining requirement of the later statute implicitly amends or repeals the earlier enactment. Accordingly, the petitions for review are granted, and the cross-petitions for enforcement are denied.

So Ordered.
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LABOR RELATIONS – 5 USC CHAPTER 71 – "THE STATUTE"

TITLE 5 OF THE UNITED STATES CODE
GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III--EMPLOYEES
SUBPART F--LABOR-MANAGEMENT AND
EMPLOYEE RELATIONS
CHAPTER 71
LABOR-MANAGEMENT RELATIONS

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SUBCHAPTER I--
GENERAL PROVISIONS

§ 7101. Findings and purpose

(a) The Congress finds that--

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

§ 7103. Definitions; application

(a) For the purpose of this chapter--

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual--

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include--

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Printing Office, and the Smithsonian Institution, but does not include--

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

(H) the United States Secret Service and the United States Secret Service Uniformed Division.

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include--

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint--

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning--

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means--

(A) an employee engaged in the performance of work--

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which--

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit--

(i) on the basis of an election; or

(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that--

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of--

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may--

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority--

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter--

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of--

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may--

(1) hold hearings;
(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and
(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.
(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
(2) in accordance with applicable laws--
(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
(C) with respect to filling positions, to make selections for appointments from--
(i) among properly ranked and certified candidates for promotion; or
(ii) any other appropriate source; and
(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

SUBCHAPTER II--
RIGHTS AND DUTIES OF AGENCIES AND
LABOR ORGANIZATIONS

§ 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority--

(1) by any person alleging--
(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or
(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or
(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;
the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which--

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;
(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or
(3) has submitted other evidence that it is the exclusive representative of the employees involved;
may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose--

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or
(2) not to be represented by a labor organization.
In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization--

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;
(2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

§ 7112. Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes--

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

§ 7113. National consultation rights

(a) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall--

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization--

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or
(B) exercising grievance or appellate rights established by law, rule, or regulation; except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
(A) which is normally maintained by the agency in the regular course of business;
(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and
(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.
(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7115. Allotments to representatives
(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when--

(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

(2) the employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

(B) Any agreement under paragraph (1) of this subsection between a labor organization and an agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which--

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by--

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall--

(A) file with the Authority a statement--

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall--

(A) be informed of any substantive change in conditions of employment proposed by the agency, and
(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.
(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization--

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and
(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice--

(A) of the charge;
(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and
(C) of the time and place fixed for the hearing.
(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of--

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or
(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6- month period,
the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order--

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;
(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;
(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or
(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.
If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what matter it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse--

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasses, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either--

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may--

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7120. Standards of conduct for labor organizations

(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for--

(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that--

(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under this chapter.

(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation--

(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or
(2) take any other appropriate disciplinary action.

SUBCHAPTER III--
GRIEVANCES, APPEALS, AND REVIEW

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e) and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

(A) be fair and simple,
(B) provide for expeditious processing, and
(C) include procedures that--
(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and
(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.
(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and
(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.
(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
(2) retirement, life insurance, or health insurance;
(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or
(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.
(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected--

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under--

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay.

Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

SUBCHAPTER IV--
ADMINISTRATIVE AND OTHER PROVISIONS

§ 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section--

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

§ 7132. Subpenas

(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may--

(1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and

(2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

(b) In the case of contumacy or failure to obey a subpena issued under subsection (a)(1) of this section, the United States district court for the judicial district in which the person to whom the subpena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States.

§ 7133. Compilation and publication of data

(a) The Authority shall maintain a file of its proceedings and copies of all available agreements and arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.

(b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title.

§ 7134. Regulations

The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

(a) Nothing contained in this chapter shall preclude--

(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

THE TECHNICIAN ACT OF 1968 – CODIFIED IN 32 USC SECTION 709

Codification of P.L. 90-486, Known as the "Technician Act of 1968"

Sec. 709. - Technicians: employment, use, status

(a)

Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in -

(1)

the administration and training of the National Guard; and

(2)

the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b)

Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1)

Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2)

Be a member of the National Guard.

(3)

Hold the military grade specified by the Secretary concerned for that position.

(4)

While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)

(1)

A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2)

The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d)

The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e)

A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

Section 709 (f) – The Adjutant General's Authority

(f)

Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned -

(1)

a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who -

(A)

is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B)

fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2)

a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3)

a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4)

a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(5)

a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g)

Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(h)

Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i)

The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

Notes on Sec. 709.

SOURCE
Aug. 10, 1956, ch. 1041, 70A Stat. 614
Pub. L. 87-224, Sec. 2, Sept. 13, 1961, 75 Stat. 496
Pub. L. 90-486, Sec. 2(1), Aug. 13, 1968, 82 Stat. 755
Pub. L. 92-119, Sec. 2, Aug. 13, 1971, 85 Stat. 340
Pub. L. 96-513, title V, Sec. 515(5)-(7), Dec. 12, 1980, 94 Stat. 2937
Pub. L. 103-160, div. A, title V, Sec. 523(a), 524(c), (d), Nov. 30, 1993, 107 Stat. 1656, 1657
Pub. L. 103-337, div. A, title X, Sec. 1070(b)(2), (d)(5), Oct. 5, 1994, 108 Stat. 2856, 2858
Pub. L. 104-106, div. A, title X, Sec. 1038(a), Feb. 10, 1996, 110 Stat. 432
Pub. L. 105-85, div. A, title V, Sec. 522(c), Nov. 18, 1997, 111 Stat. 1735
Pub. L. 106-65, div. A, title V, Sec. 524, Oct. 5, 1999, 113 Stat. 599.

Amendments to Section 709.

1999 - Pub. L. 106-65 amended section catchline and text generally, revising and restating provisions relating to employment, use, and status of technicians. 1997 - Subsec. (b). Pub. L. 105-85 substituted "A technician" for "Except as prescribed by the Secretary concerned, a technician". 1996 - Subsec. (b). Pub. L. 104-106 amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position." 1994 - Subsec. (e)(6). Pub. L. 103-337, Sec. 1070(d)(5)(A), substituted "30 days before" for "thirty days prior to".

Pub. L. 103-337, Sec. 1070(b)(2), made technical correction to directory language of Pub. L. 103-160, Sec. 524(c). See 1993 Amendment note below.

Subsec. (g)(2). Pub. L. 103-337, Sec. 1070(d)(5)(B), substituted "paragraph (1)" for "clause (1) of this subsection". 1993 - Subsec. (e)(6). Pub. L. 103-160, Sec. 524(c), as amended by Pub. L. 103-337, Sec. 1070(b)(2), inserted ", unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment," after "termination of his employment as a technician and".

Subsec. (h). Pub. L. 103-160, Sec. 524(d), struck out subsec. (h) which read as follows: "In no event shall the number of technicians employed under this section at any one time exceed 53,100." Subsec. (i). Pub. L. 103-160, Sec. 523(a), added subsec. (i). 1980 - Subsec. (f). Pub. L. 96-513, Sec. 515(5), struck out ", United States Code," after "title 5".

Subsec. (g). Pub. L. 96-513, Sec. 515(6), substituted "6101(a) of title 5" for "6102 of title 5, United States Code," in two places, "5332 of title 5" for "5332 of title 5, United States Code" and "5543 of title 5" for "5543 of title 5, United States Code,".

Subsec. (h). Pub. L. 96-513, Sec. 515(7), struck out limitation of 49,200 technicians employed during the fiscal year beginning July 1, 1971. 1971 - Subsec. (h). Pub. L. 92-119 increased number of technicians employable under section from 42,500 to 53,100 with exception that such number is fixed at 49,200 for fiscal year beginning July 1, 1971. 1968 - Pub. L. 90-486 substituted "Technicians: employment, use, status" for "Caretakers and clerks" in section catchline.

PUBLIC LAW 90-486 AMENDMENTS:

Subsec. (a). Pub. L. 90-486 substituted provisions that persons may be employed as technicians in administration and training of National Guard and maintenance and repair of supplies issued to National Guard or armed forces for provisions that authorized the Secretaries of the Army and the Air Force to hire, out of funds allotted to them for the Army National Guard and the Air National Guard, respectively competent persons to care for material, armament, and equipment of the Army National Guard and Air National Guard, and provisions that a caretaker so employed may also perform clerical duties incidental to his employment and other duties that do not interfere with performance of his duties as caretaker.

Subsec. (b). Pub. L. 90-486 substituted provisions requiring, except as prescribed by the Secretary concerned, any technician employed to be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position for provisions permitting civilians as well as enlisted men to be employed as caretakers, provided that if a unit has more than one caretaker, one of them must be an enlisted member, and provisions that any compensation under this section is in addition to compensation otherwise provided for a member of the National Guard.

Subsec. (c). Pub. L. 90-486 substituted provisions authorizing the Secretary concerned to designate adjutants general to employ and administer the technicians authorized by this section for provisions authorizing the Secretary concerned to place in a common pool for care, maintenance, and storage the material, armament, and equipment of the Army National Guard or Air National Guard, with proviso that not more than 15 caretakers be employed for each pool.

Subsec. (d). Pub. L. 90-486 substituted provisions that a technician employed under subsec. (a) is an employee of the particular department concerned, and an employee of the United States, with proviso that a position authorized by this section is outside competitive service if technician so employed is required under subsec. (b) to be a member of the National Guard, for provisions that one commissioned officer of the National Guard in a grade below major may be employed for each pool set up and for each squadron of the Air National Guard.

Subsec. (e). Pub. L. 90-486 substituted provisions authorizing the adjutant general of the jurisdiction concerned to separate from technicians employment any technician for the specified grounds, provisions requiring the technician concerned to be notified in writing of the termination of his employment at least 30 days prior to the termination date of such employment, and provisions granting a limited right of appeal from such termination, for provisions appropriating funds by Congress for the National Guard as additional to funds appropriated by the several states and territories, etc., and provisions making such funds available for the hire of caretakers and clerks.

Subsec. (f). Pub. L. 90-486 substituted provisions making inapplicable sections 2108, 3502, 7511, and 7512 of Title 5 to any person employed under this section for provisions authorizing the Secretary concerned to fix the salaries of clerks and caretakers and to designate the person to employ them, and provisions authorizing compensation to include the amounts of the employer's contributions to retirement systems. Subsecs. (g), (h). Pub. L. 90-486 added subsecs. (g) and (h). 1961 - Subsec. (f). Pub. L. 87-224 provided that the authorized compensation may include employer's contributions to retirement systems, and that such contributions shall not exceed 6 1/2 per centum of the compensation upon which based

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LABOR RELATIONS SITUATIONAL EXERCISES – FROM THE FLRA

Select the Best Answer to the Following Questions (answers found at the bottom of page 2)

1. During a campaign by two unions to obtain exclusive recognition, you have come to the conclusion as a high management official of the agency, that one of the unions competing is far superior to the other one. Based on this, you decide to take some action for the good of the agency. Which of the following actions, if any, would be appropriate?

a. Hold a meeting of all employees and discuss your views.
b. Write a memo to all employees explaining your views.
c. Discuss your views with all supervisors subordinate to you and ask them to express those views to their employees.
d. None of the above.

2. As a high management official, you conclude that it is essential to radically alter the plan for scheduling lunch periods. There is no article in the contract referencing this subject. Which action should you take?

a. The opportunity to negotiate must be provided to the local union before the new program is implemented.
b. Since the contract does not address the issue, no negotiation with the union is necessary although it may be good for political reasons.
c. Although negotiation with the union is not necessary, it is necessary to solicit the views of the employees without the union's intervention.
d. None of the above.

3. While walking by, you overhear one of your employees, who is a union representative, trying to get three other employees to become union members during duty hours. Which action would be proper?

a. I would take the "management position" and attempt to talk the three employees out of signing up.
b. I would tell the representative that he is engaging in internal union business on government time and such discussions are unauthorized.
c. I would do nothing since discussion regarding union membership is protected activity under 5 USC Ch. 71 and to forbid this activity might subject the agency to an unfair labor practice complaint.

4. One of your employees approaches you and asks you to join the local union so you can run for a union office. How would you respond to the request?

a. I would tell the employee that while I am entitled to join the union. I cannot hold a union office or play a role in the management of the labor organization.
b. I would tell the employee that, as a supervisor, I can not join the union or hold an office in the organization.
c. I would accede to the employee's request in the interest of good labor-management relations.

5. How many employees must a person supervise in order to be considered a supervisor for labor relations purposes?

a. Three
b. One
c. No set number is required but, in order to be a supervisor, a person must be at least a Branch Chief.

6. An employee comes to you and indicates that he wishes to file a grievance under the agency grievance procedure. According to the Labor Relations Officer, the subject on which he wishes to file the grievance is covered by the negotiated grievance procedure. The employee tells you he does not want to use the negotiated procedure. What should your reaction be?

a. That the grievance will be processed under the agency procedure in accordance with his wishes.
b. That the negotiated procedure is the exclusive procedure available to him and that he must use that procedure.
c. I would ask the president of the union local if he has any objections to the employee's using the agency procedure.

7. Following a long antagonism between two of your employees that included several shouting matches, a fight breaks out resulting in some broken furniture and minor injuries. After taking action to issue proposed removal notices to the two employees, the union president approaches you with a demand that you negotiate regarding the severity of the penalties. Must you negotiate in this situation?

a. No, the decision to remove an employee is a sole prerogative of management.
b. Yes, since this a personnel matter, although I need not agree to any union proposal.
c. Yes, because the action involves more than one bargaining unit employee.

8. You are the deciding official in a negotiated grievance proceeding in which the employee is representing himself. The union claims it has a right to be present at the adjustment of the grievance. How do you respond to the union?

a. I would not allow the union to be present, as the employee is representing himself.
b. I would allow the union to be present only if the employee agreed to have the union serve as his representative in the grievance.
c. I would allow the union to be present at the adjustment of the grievance.

9. An employee in the bargaining unit whom you supervise indicates his desire to file a religious discrimination grievance using the negotiated procedure. Would you allow the use of this procedure?

a. No, because this is clearly a complaint which must be handled under the EEO procedure established by law.
b. Yes, but only after the employee has exhausted his rights under the EEO appeal system.
c. Yes, so long as EEO appeals are within the scope of the negotiated procedure and the employee has not filed a complaint relating to the same problem under the EEO procedure.

10. An employee under your supervision who has requested a promotion is performing at a level that is, at best, "average" for his current grade. When you call the employee in to tell him what deficiencies exist and how to improve to justify a promotion, the employee insists on union representation. How do you respond?

a. I would grant the demand since the meeting is a formal discussion.
b. I would not grant the demand since the meeting is a personal counseling session.
c. I would grant the demand since the meeting concerns negative factors in the employee's work performance.

WHEN IN DOUBT…CALL YOUR LABOR RELATIONS SPECIALIST IN THE HUMAN RESOURCES OFFICE!!!

LRS TRAINING PLAN MATRIX:

Recommended Labor Relations Specialist Training Plan Matrix				
Course	Provider (By Priority)	Approx Length	Priority (I-III)*	Time-Frame (at or before)
Labor Relations Orientation**	NGB/LRAC	1 Day	I	30 Days
Basic Labor Relations	NGB/LRAC AF Civ Pers School FAS FPMI USDA	5 Days	I	60 Days
Negotiating Labor Agreements	NGB/LRAC AF Civ Pers School FAS FPMI USDA	5 Days	I	120 Days
Basic Mediation / ADR / Problem Solving	DEOMI Atlanta Justice Center ADR / AZ	5 Days	II	18 Months
Interest-Based Bargaining	FAS FPMI USDA	3	II	18 Months / or Prior to Contract Negotiations
LRS Legal Research / Legal Writing	NGB/LRAC/HRAC/ USDA	1 Day	II	12 Months
Discipline / Adverse Actions and Non-Disciplinary Actions	NGB/LRAC/HRAC/ USDA	2 Days	I	90 Days
Advanced Labor Relations	NGB/LRAC	3 Days	II	36 Months
Basic Staffing	NGB FAS USDA	4 Days	III	36 Months
Basic Classification	NGB FAS USDA	5 Days	III	36 Months
Supervisor's Course	In-House	5 Days	I	12 Months
Arbitration for Advocates	FMCS FPMI	5 Days	III	36 Months
NGB Hearing Examiners Course	NGB/HRAC/ LRAC	5 Days	III	48 Months
Basic EEO Course	DEOMI	10 Days	III	48 Months
*Priority I = Mandatory (immediate) Priority II = Mandatory (short-term) Priority III = Desired **Read the NGB Labor Relations Reference Manual Upon Assignment to the LRS Position!!!				

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SUGGESTED WEB SITES AND SOURCES FOR LABOR RELATIONS INFO:

"Free" General Sources for Labor Relations Information and Research

http://www.cpms.osd.mil/fas

http://www.flra.gov

http://www.opm.gov

http://www.fmcs.gov

More "Free Sources for Labor Law (5 USC and 5 CFR)

http://aflsa.jag.af.mil - (must be signed up as an authorized user)

http://www.law.cornell.edu

http://www.access.gpo.gov

Federal Civilian Personnel Information from Air Force, Army and NGB

https://gko.ngb.army.mil - (NGB Guard Knowledge Online)

http://www.afpc.randolph.af.mil

http://cpol.army.mil

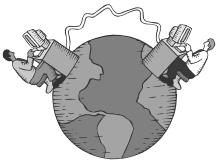
http://www.cpms.osd.mil/nsps - National Security Personnel System Info.

Commercial Vendors for Labor and Employee Relations Information:

http://www.westlaw.com - (formerly personnet.com)

http://www.lrp.com - (also excellent and lower priced than personnet)

http://www.feds.com



Publications Available:

Federal Labor Relations Reporter – LRP, Inc.

Federal Arbitration Advocate's Handbook, LRP Publications – Celmer, Esq.

FLRA Law and Practice by Peter Broida – Dewey Publications, Inc.

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CONTACTS PAGE:

(i.e. Union Officers, Stewards, NGB-HR-TNL & Labor Specialists, etc.)

Name	Phone

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